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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1085

THOMAS MATTEO, *Petitioner,*

against

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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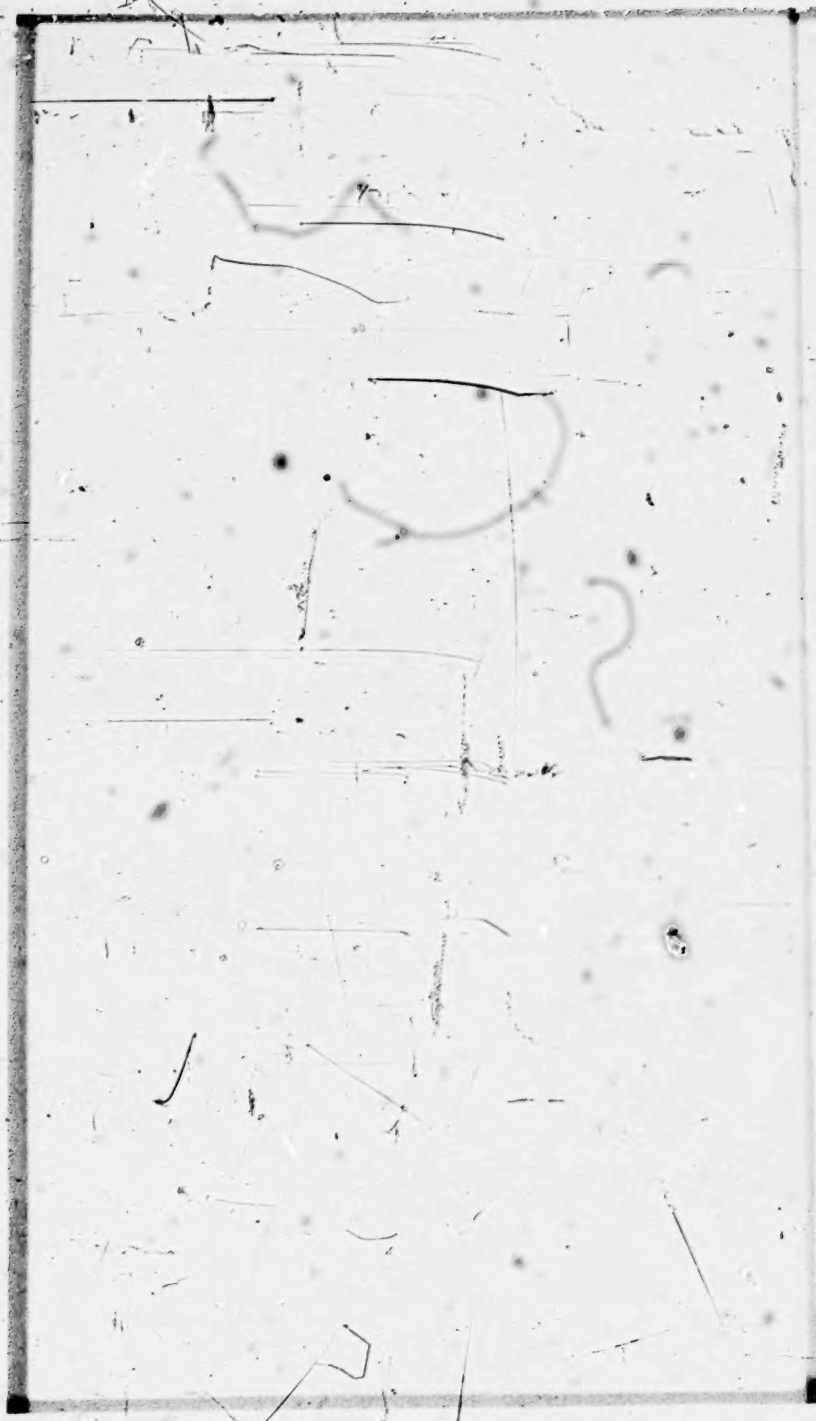

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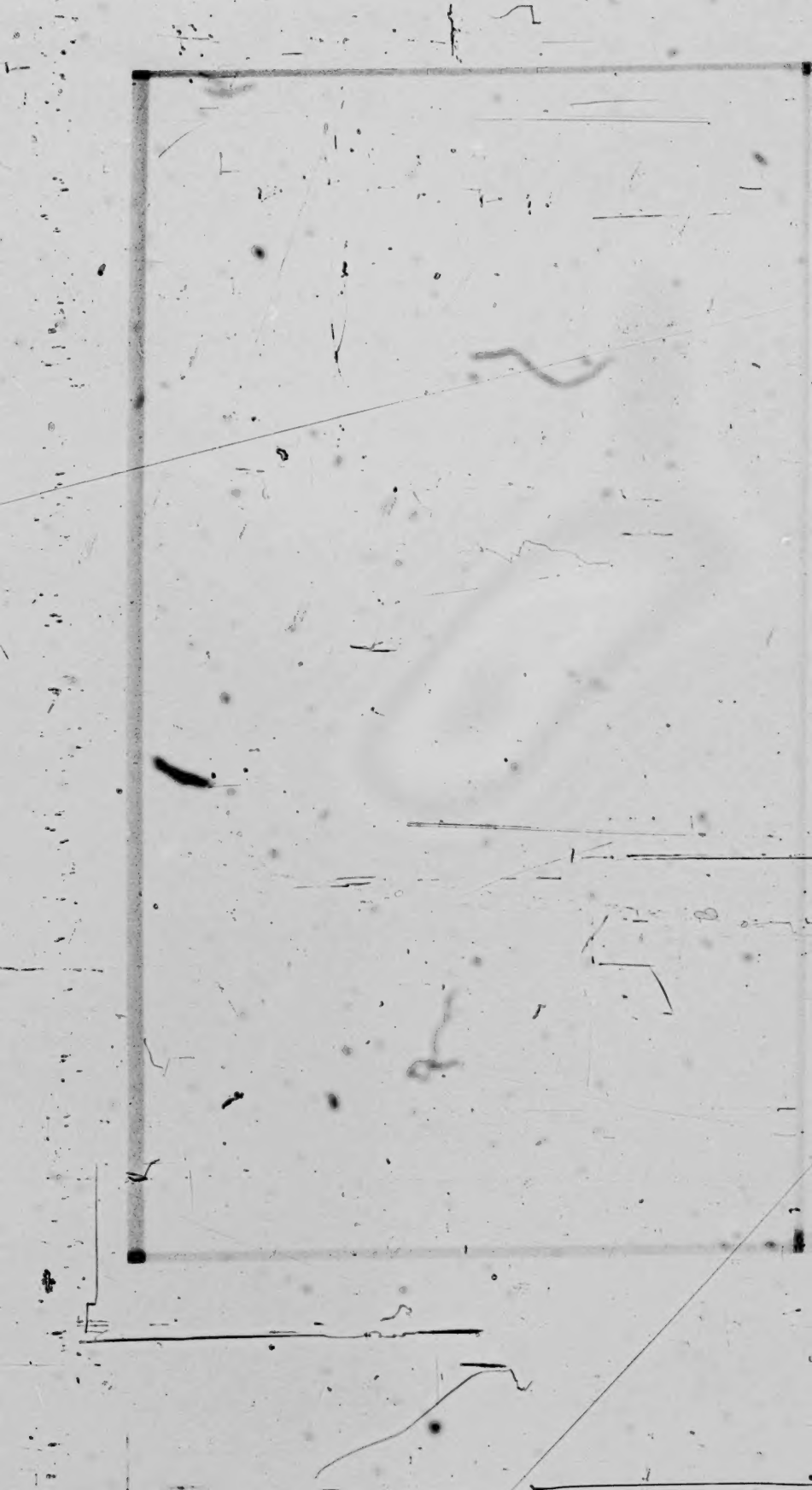

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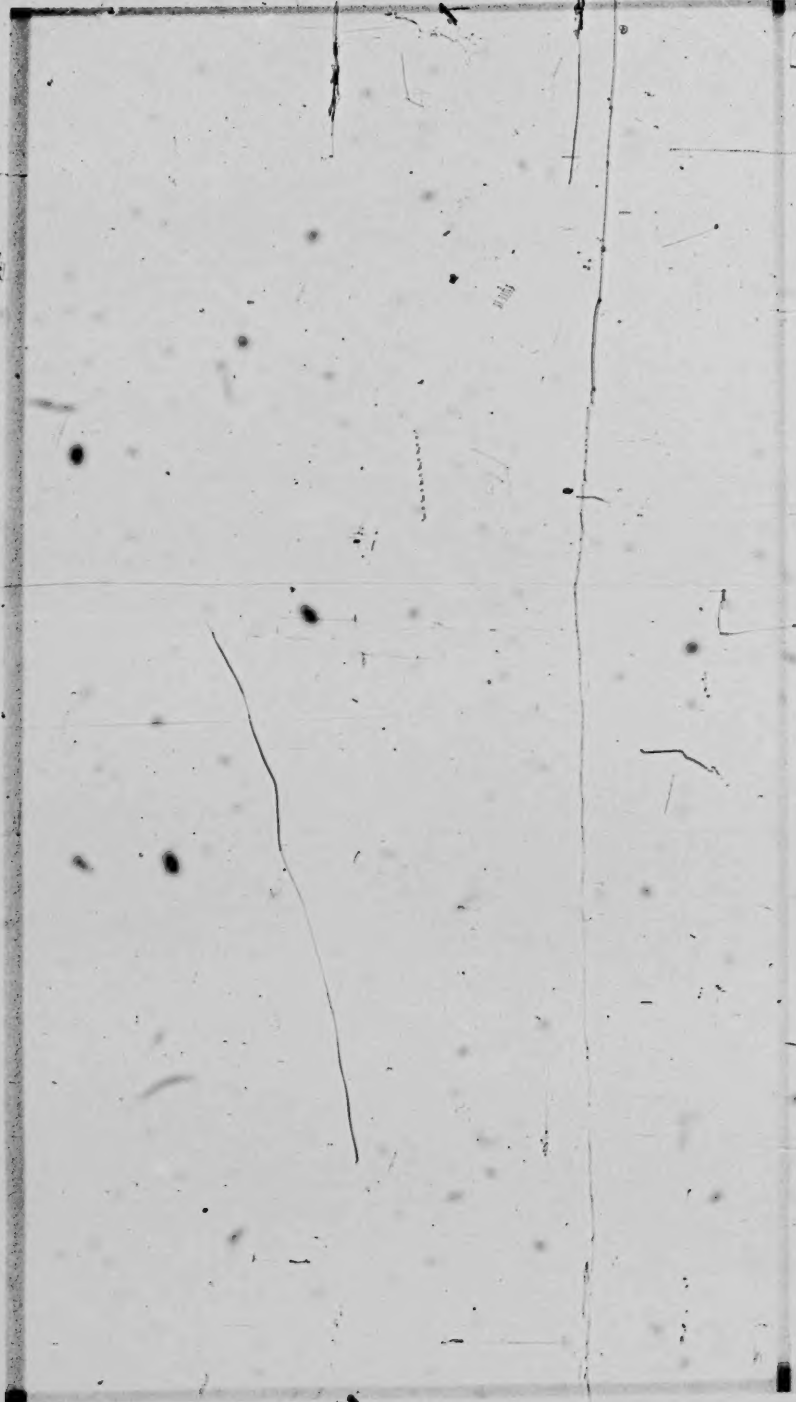

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THOMAS MATTEO,

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-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, THOMAS MATTEO, respectfully prays that this Court issue a writ of certiorari to review the Judgment and Order of the United States Court of Appeals for the Second Circuit, rendered on January 29, 1975, which affirmed petitioner's ~~conviction~~ for

conspiracy to deal in narcotics in violation of 21 U.S.C., Sections 812, 841(a)(1) and 841(b)(1)(A).

Petitioner was convicted after a jury trial in the United States District Court for the Eastern District of New York, Chief Judge Mishler, presiding. He was sentenced on October 4, 1974 to ten years in prison and a special probation of five years.

The Court of Appeals affirmed on January 29, 1975, unanimously and with no written opinion.

JURISDICTION

The jurisdiction of the Court is invoked under Title 28 U.S.C., Section 1251. No opinion was written by the Court of Appeals.

QUESTIONS PRESENTED

1. To what extent can the grand jury testimony of a recalcitrant government witness who attacked the truthfulness of that testimony be introduced at trial.

2. Under the ruling in Harris v. New York, 401 U.S. 222 (1971), can a statement of a defendant, already ruled inadmissible be used on cross examination of the defendant without any limitation that it be used for the purpose of impeachment of testimony

adduced on direct.

3. Can rebuttal testimony which proves other, substantial narcotics crimes not alleged in the indictment be introduced without foundation questions and only in answer to a general denial of the defendant that he was not engaged in narcotics traffic in general.

4. Was petitioner denied the effective assistance of counsel under the facts of this case.

STATUTE

21 U.S.C. Section 841 — Prohibited acts (A)- Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally --

(1) to manufacture, distribute or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

Penalties

(b) Except as otherwise provided in Section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

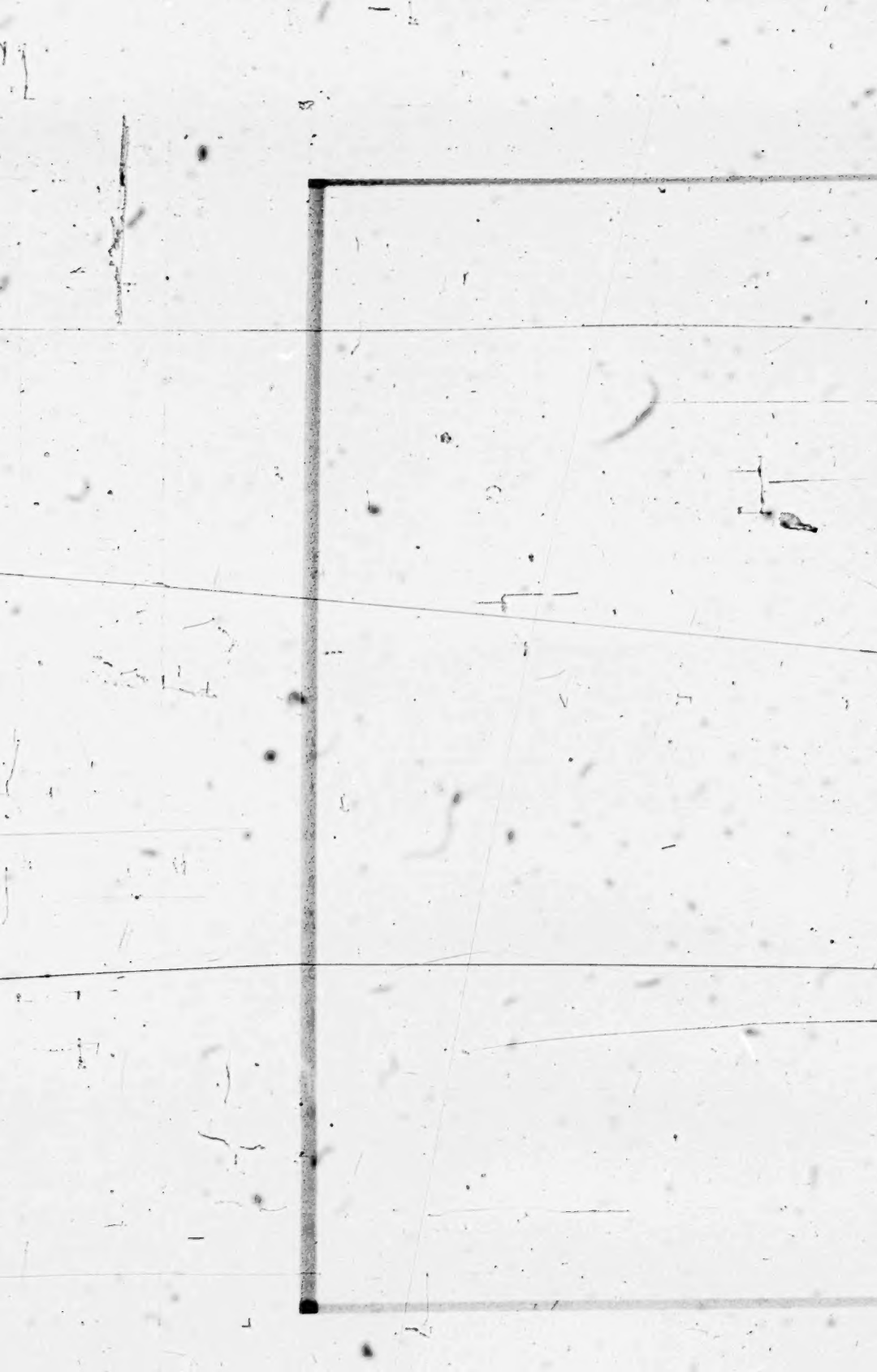
(1) (A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000., or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States

relating to narcotic drugs, marihuana or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000., or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

FACTS

Prior to the picking of a jury, a motion was made to suppress statements given in the office of MR. RITCHIE, the Assistant United States Attorney, after petitioner had been arrested and brought in for arraignment. The answers given were basically not incriminating anyway, but the Court ruled them admissible since MATTEO was advised of his rights. (78)* The Court also decided that a point came during the questioning when MATTEO refused to talk any further, apparently because his attorney was in the building, so the interrogation ended and they all proceeded down for the arraignment. At this point, on the way down, petitioner supposedly made an incriminating statement to an agent, which was ruled inadmissible because the Court found that MATTEO

*Numerical references are to pages of the record. References followed with the letter "A" are to pages of appendix in Court of Appeals.



should have been readvised of his rights by the agent, since he had just indicated an unwillingness to answer further questions. (133A-136A).

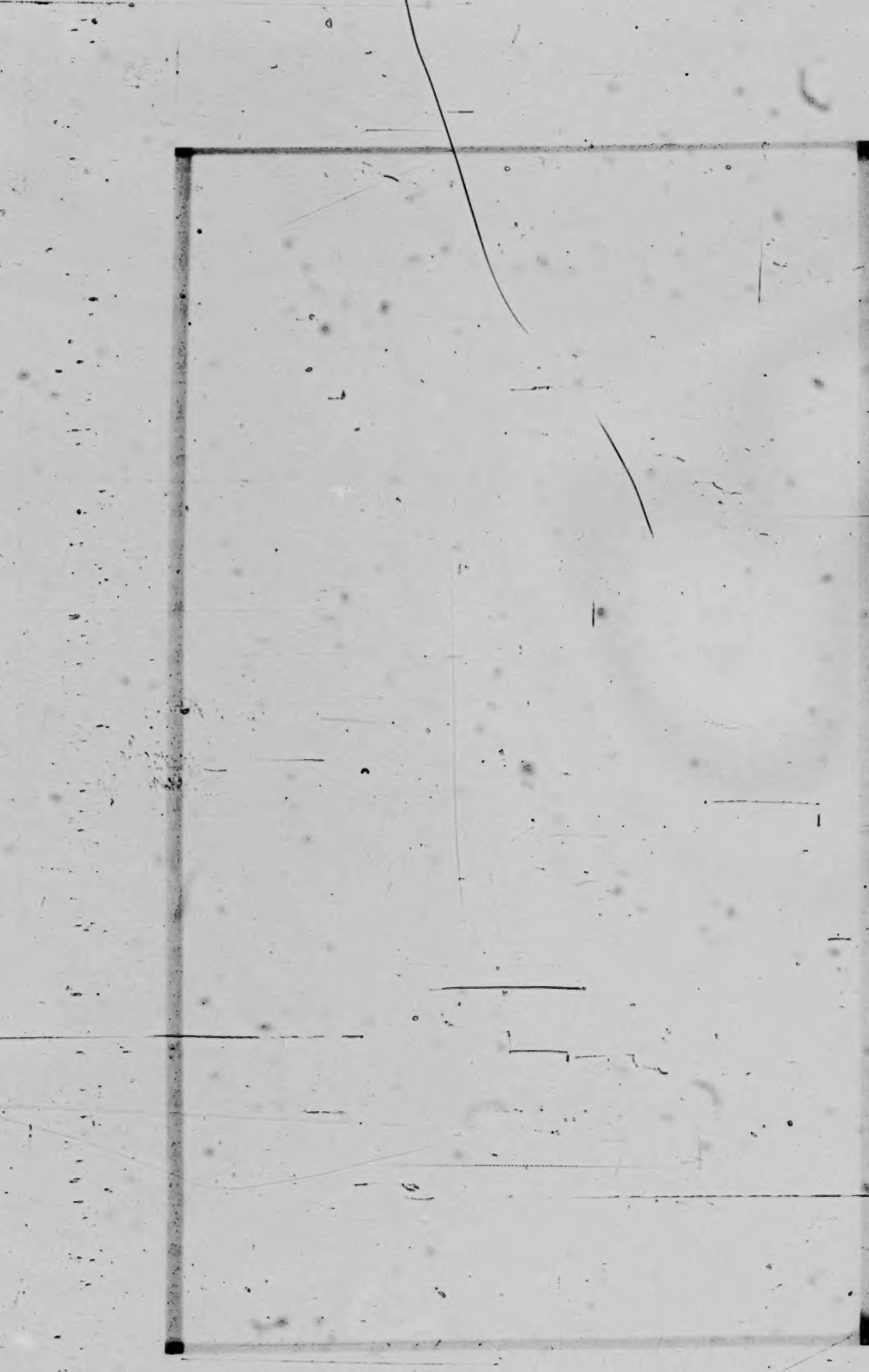
The trial began, and the prosecutor told the jury what one witness, JAMES McCORMACK, would be testifying to, although he was already acting up, down in the basement, refusing to take his medication. (130)

The first witness was FRANK J. AGUIAR, an admitted, convicted heroin seller since 1968. His normal source of supply was a fellow named SOMAS, who introduced him to petitioner in the Spring of 1968 (136) MATTEO agreed to supply him with uncut merchandise. After that he got narcotics from MATTEO through SOMAS, who was later replaced by FRANK BREEN (138-140). In the Fall of 1969, he met with BREEN and MATTEO, who complained that he was short-changed by SOMAS, and thereafter they had another meeting in November, wanting to borrow $16,000.00 from him to go into business. (148-149) AGUIAR gave them the money a few days later and a short time after that they delivered one kilo of heroin to him. (150) He bought three more small packages on a different occasion, when a police raid occurred. They were not

arrested because he bribed the police officers, RONALD PETRO and a cop named FREEMAN, with $4,000.00. (153) He also said that all during 1970 until the Summer of 1971 he was picking up various quantities of heroin from the petitioner. (159-161). Then AGUILAR put up $33,000.00 and they dealt as partners for six or seven months. (162) They ended their partnership in January, 1971, but continued to deal with each other until April, when he made one purchase of ten kilos for $180,000.00. (163-164) He bought another ten kilos in September, but the witness was arrested himself for selling part of the ten kilos he had gotten from MATTEO. (165) MATTEO owed him $150,000.00. (169)

The following Fall, September of 1972, MATTEO still owed him a lot of money. The witness wanted to go back into narcotics to settle the debt. His brother gave MATTEO $60,000.00 packed in bundles of $10,000.00 each. (174)

Before cross examination, the government put JAMES McCORMACK on the witness stand. He refused to take the oath and complained that he had been assaulted by a C. COFFEY in West Street, he had been brought in from a State prison against his wishes and he had been threatened. (9A) The prosecutor applied for a formal grant of



immunity which was granted after being explained and the Court also explained the possible contempt consequences in case of a refusal to testify. (20A) The witness said he did not care because he had been threatened and assaulted and he demanded the protection of the Court. (21A-30A) The drama continued, but after the Court said that if he refused to testify a mistrial would not be in order, it was pointed out that the prosecutor in his opening had already told the jury what his testimony would be, even though he already knew McCORMACK would refuse. (21A-32A,34A-36A)

McCORMACK was granted immunity. (42A-43A) He was then excused to obtain his own attorney. (46A-48A)

The next witness was LINDA PIZZELLA, who was living with CRANK AGUIAR and she basically said the same things as AGUIAR had. (354-362)

On cross examination, she admitted being an addict, heavily dependent on AGUIAR, and she also admitted selling drugs in the street. (363-380) She also said she was very much afraid of AGUIAR. In fact, he even used a knife on her (382), although she claimed she still lived with him and yet was not afraid anymore. (404-405)

McCORMACK came back, complaining that six correction officers had attacked him and the Court noted scratches on his shoulders. (49A-50A) He admitted knowing petitioner and said he had been in jail for sixteen years. When he was questioned about petitioner and narcotics his answers were unresponsive. When confronted with his grand jury testimony, the witness said he had been under heavy sedation when he was before the grand jury and he had been in intensive psychotherapy for the past eight months at the Adirondacks Correctional Treatment Center. (54A-55A) The witness said he could not recall his grand jury testimony, but the Court held he was wilfully failing to answer questions (58A-59A), and held him in contempt. (61A) There was further colloquy between McCORMACK and the Court and McCORMACK continued to deny his grand jury testimony and complain about mistreatment. In fact, the entire McCORMACK episode covered about one hundred pages, one-eighth of the entire trial testimony.

The prosecutor was allowed to impeach his witness by reading the entire testimony taken before the grand jury although the witness continually said that

he could not recall his testimony, (90A-118A) protesting that he was sick (96A) and he wanted to see a doctor and was suffering. (98A) He also repeated that when he was in front of the grand jury he had been heavily sedated and the records of Kew Gardens Prisons would show it. (105A) On cross examination, McCORMACK detailed all of the psychiatric treatment and intensive therapy he had been receiving all during his prison life. (119A-121A)

The prosecution then called Lt. JOHN M. THOMSEN, who described finding MATTEO on September 27, 1972, at 11 Caton Street, East Northport. This was INDIVIGLIA's home, and MATTEO was found unconscious with five bullets in him, a pistol at his side and a large amount in cash in a black case. (123A-127A) There was no objection. (124A) The money was received in evidence with objection (526-527) The gun was described and the whole scene gone into in great detail. (130A-132A)

GERALD GRAFFAN, a narcotics agent, described his arrest of the petitioner on November 6, 1973, and his transporting him to Suffolk County Police headquarters and then to the Federal offices in Westbury. (547-548)

he advised appellant of his rights on the way to the Eastern District and MATTEO was then brought to the Office of Assistant United States Attorney RITCHIE. (149-151, 152)

The Assistant, DAVID J. RITCHIE, then testified about the interrogation of petitioner in his office, and he related the answers MATTEO gave. RITCHIE asked him if he dealt in junk and MATTEO denied it, saying he was broke. RITCHIE said, "How can you be broke, you have got plenty of money." MATTEO said, "If I had plenty of money, why did I have to borrow $60,000.00 from Frank." (137A) MATTEO also said that the only other people he knew that were dealing in drugs were [illegible]. (138A)

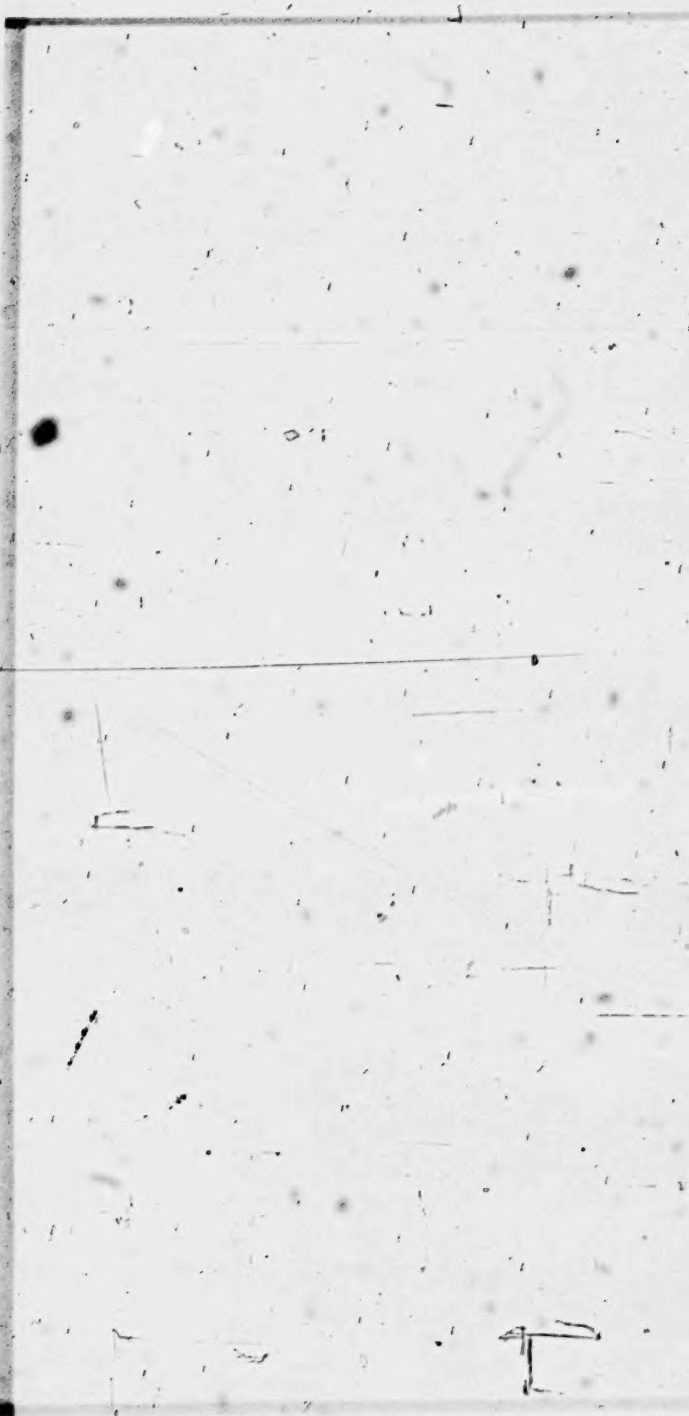
JOSEPH THOMSON, a Suffolk County detective, also described finding MATTEO when he was shot, and he told the jury of his finding other narcotics implements in the house, even though the Court said it was outside the charge, because petitioner's counsel said he did not care. (139A) The implements consisted of scales, bottles and other paraphernalia relating to narcotics activity. (140A-141A) The use of all the different materials was described in detail (142A-143A), without objection. (144A) The officer was on the premises

pursuant to a search warrant directed against the premises and its owner, CHARLES INDIVIGLIA. (145A) The bulk of the materials were found in the bedroom, the attic and the garage. (145A-146A) The government rested and THOMAS MATTEO took the witness stand. He said he was basically a numbers runner and met FRANK AGUIAR in connection with that business. AGUIAR was a patron of the Oasis Bar, a regular stop of MATTEO's and he started placing bets four or five times a week, at least $100.00 each time. (575) He also saw him at other bars and was even at his apartment a few times. (576)

AGUIAR kept telling him he was in penny-ante stuff and he should get involved in narcotics like he was. (577) MATTEO never went into it, but continued his numbers running. (578) In 1971, he borrowed $14,000.00 from AGUIAR to go into a partnership in a bar called The Whales College Lounge. (578,581) He was supposed to pay back $18,000.00. (582) He only paid back $3,000.00 and by 1971 still owed $11,000.00, a situation which made AGUIAR very angry. (582) In fact, about a month before he was shot, AGUIAR threatened him with

a knife unless he paid the money. (583) There was an actual altercation in which a bystander almost got slashed. (584) A month later, MATTEO was shot. (584) In the meantime, AGUIAR's brother met with him as an intermediary and they decided to expand the lounge, to make enough to make a profit and repay the original loan, and MATTEO said he would need another ~~$50,000.00~~ or $60,000.00. (585) The brother promised to get back to appellant, and the day before he was shot he called to say that he had spoken to his brother and they agreed that it was a good idea. (587) They agreed to meet at INDIVIGLIA's house at AGUIAR's suggestion. (587) Appellant went there to get the loan and entered the kitchen where he had coffee with INDIVIGLIA. (588)

INDIVIGLIA told him he really should have paid the money back (588), and then answered the telephone, apparently a call from AGUIAR, and told the caller that MATTEO was there. (589) After some more talk, MATTEO felt like he was hit in the head with a hammer, he heard shots and he fell to the floor. (590) He was unconscious for four days and he described his treatment, including the extraction of one bullet from



his brain, two from his spinal cord and two from his abdomen. (591) He reiterated that he had nothing to do with drugs, only numbers running. (592)

On cross examination, he denied being involved with AGUIAR, INDIVIGLIA or TYLER SOMAS in drugs. (596-597) He also denied having a pistol (599), or seeing any money in INDIVIGLIA's house when he was shot. (600) He explained his conversation with Assistant United States Attorney RITCHIE by saying he told him he was trying to borrow $60,000.00 from AGUIAR, which was true. (601)

MATTEO was then asked if he frequented the Club International and when he replied that he had only been there a few times, he was asked if he knew JOSEPH ABBRUZZO. The name was repeated, the man was described, but petitioner said he may have met him, but did not think so. (146A-147A) No explanation was made by the government as to ABBRUZZO's connection with the case and no other foundation of any sort was laid. MATTEO also denied knowing anything about the $350,000.00 found near his body. (607-608)

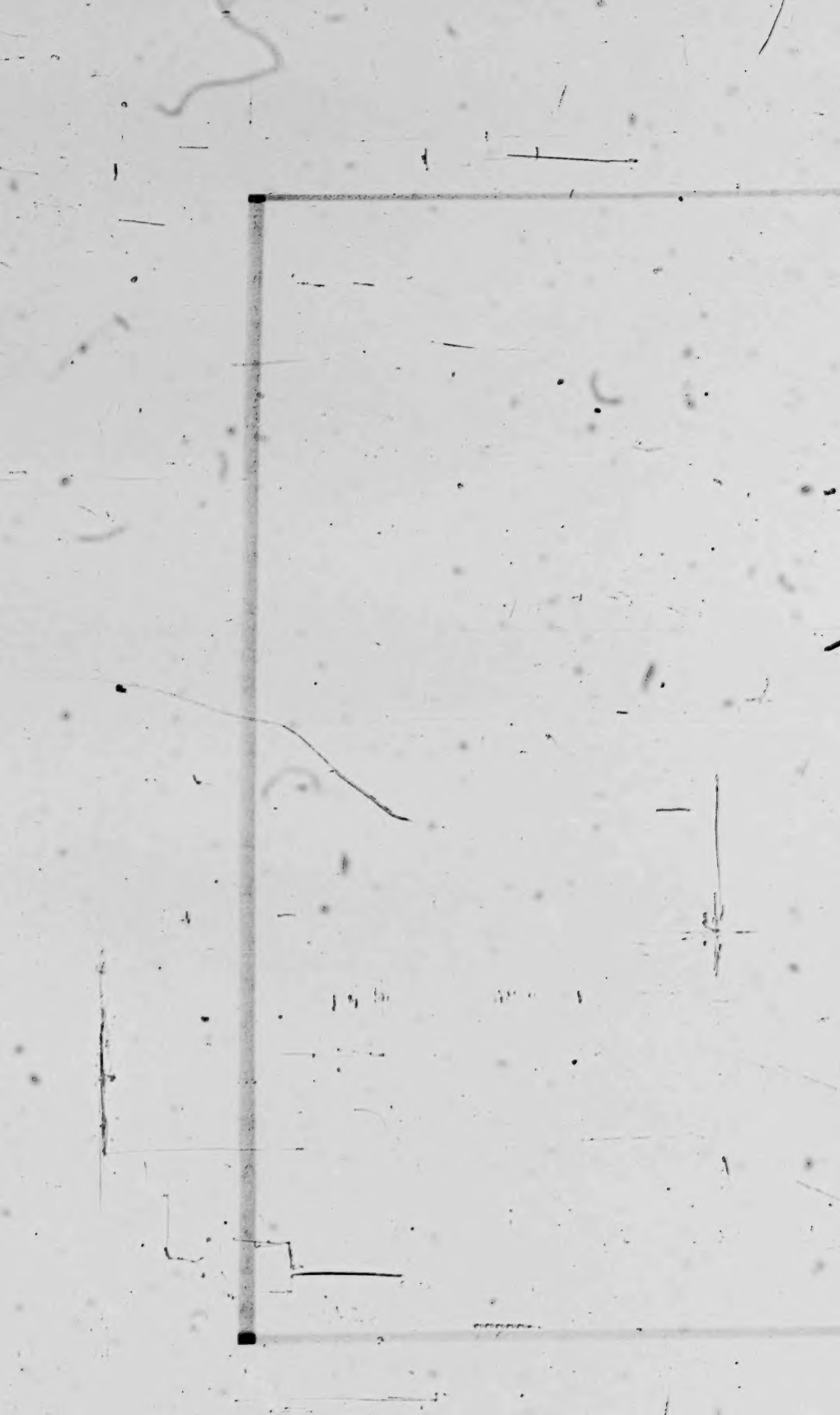
The prosecutor asked petitioner if on the way down to be arraigned after his conversation with

Assistant United States Attorney RITCHIE he had a conversation with Agent SCHNEPPER. (148A) This was the conversation that the trial Judge had already ruled inadmissible on the government's direct case, but now, it could be used in cross examination. (610) Petitioner's counsel conceded that the prosecutor could ask the question. (148A)

At any rate, the conversation was that SCHNEPPER said to MATTEO that he was aware MATTEO had done five to ten kilograms at a time, but he wanted to know what INDIVIGLIA was doing, and MATTEO responded that INDIVIGLIA was doing thirty to forty kilos at a time. (148A-149A) MATTEO admitted saying that and also that INDIVIGLIA had lost his European connection, and counsel at no time objected that the statements were prejudicial or even that they were not really even admissions.

The government called JOSEPH AVERSO, in rebuttal, apparently the man referred to as ABRUZZO in the cross examination of petitioner, but counsel did not object that the name was not the same. He was then a Federal prisoner serving a three to ten year sentence, having been convicted of two narcotics conspiracies. (626-627)

He was asked to point out MATTEO and he positively and with great certainty identified the wrong person, pick-



ing out a spectator who turned out to be a police officer. He was asked to look again and then he happened to pick out MATTEO who was sitting at the counsel table. (150A-152A)

He then told a fantastic story, without objection, of meeting MATTEO at the Club International. MATTEO was drunk and came home with him to sleep at his apartment. (152A-153A) MATTEO told him he made his money in narcotics and the witness said he asked MATTEO if he wanted to buy drugs because he was involved in smuggling heroin into the country. (153A-154A) A few days later, he introduced MATTEO to his partner, BOISE, and at the end of June, 1971, BOISE gave MATTEO a shopping bag full of drugs for a shopping bag full of money. (154A-155A) AVERSO's testimony was never even objected to.

The Court told the jury that AVERSO's testimony was to be used for credibility purposes (159A-160A), and it said nothing about JAMES McCORMACK or MATTEO's alleged statement to the police officer, except that it had to be voluntary and should be used only to impeach. (745-747)

The jury requested a re-reading of the testimony where MATTEO related his conversation with Agent SCHNEPPER (161A), and then they convicted him. (162A)

Although most of the damaging evidence came in without objection at trial, appellate counsel tried to remedy the matter on sentence by appropriate motions which were entertained but denied.

POINT I

THE READING OF JAMES McCOMBRICK'S GRAND JURY TESTIMONY TO THE JURY WAS IMPERMISSIBLE. IT ALLOWED PETITIONER TO BE CONVICTED BY OUT OF COURT HEARSAY EVIDENCE, IN VIOLATION OF HIS RIGHT TO DUE PROCESS AND TO CONFRONT WITNESSES.

The only real evidence against petitioner was that of FRANK AGUILAR, a self confessed major narcotics dealer, who had made more than $400 000.00 in heroin, whose testimony could possess little credible worth. Added to this was the word of his narcotics addict girlfriend, who he occasionally used his knife on, and who was deathly afraid of him. The only other evidence adduced on the government's case had virtually nothing to do with proving the elements of the crime. The admission made to the United States Attorney, PAUL, was not an admission of guilt at all and the finding of petitioner's wallet ridden away, with the money beside it, in a house containing narcotics paraphernalia, was not only highly prejudicial, but it, too, had nothing to do with this case. Probably the

most damaging evidence in the whole trial was the grand jury testimony of McCORMACK, because it came from a man who was supposedly a friend of petitioner, and who the Court intimated to the jury was acting only to help MATTEO. (58A-61A)

Clearly, in permitting the prosecutor to read to the jury each and every question propounded and answered in the grand jury, even though the witness could not recall them and he claimed to have been under sedation when he gave the testimony, was to, in effect, allow the jury to consider the evidence for its truth. The witness kept complaining that he was sedated due to mental illness and detailed his long history of psychiatric treatment. (54A-55A, 119A-121A) At one point he said that the prison records at Kew Gardens, where he had been apparently housed before being taken to the grand jury, would prove the sedation (105A), yet no attempt was made to ascertain the truth. The witness' mental history should have made the Court refuse to permit the lengthy reading of the grand jury testimony.(469-497), since that condition alone made it suspect. This was not a situation where a witness could not recall his testimony at the time he

testified on trial, but averred that it was true when he was before the grand jury. It was, rather, an instance where he directly attacked his prior testimony, for this case again presents the unheard of situation where a whole line of questions and answers was permitted to be read rather than a short identification previously made, such as in United States v. DeSisto, 329 F.2d 929,933, 1964).

It has always been recognized that the long established rule is that prior inconsistent statements, regardless of their nature, are never allowed into evidence except for the purpose of impeachment. Bridges v. Wixon, 326 U.S. 135, 153-154 (1945). That rule was recognized by the Second Circuit in United States v. Leonti, supra, as well as most commentators, McCormick Evidence 75-79 (1954), although it has been criticized in many quarters. The rule has also been followed in most jurisdictions, and no distinction has been made as to whether the prior hearsay testimony consisted of statements of evidence given before a grand jury. Grunewald v. United States, 353 U.S. 391 (1957); Grunsky v. United States, 351 F.2d 796 (D.C. Cir. 1965) United States v. Cobbs, 448 F.2d 1262 (9th Cir. 1971); United

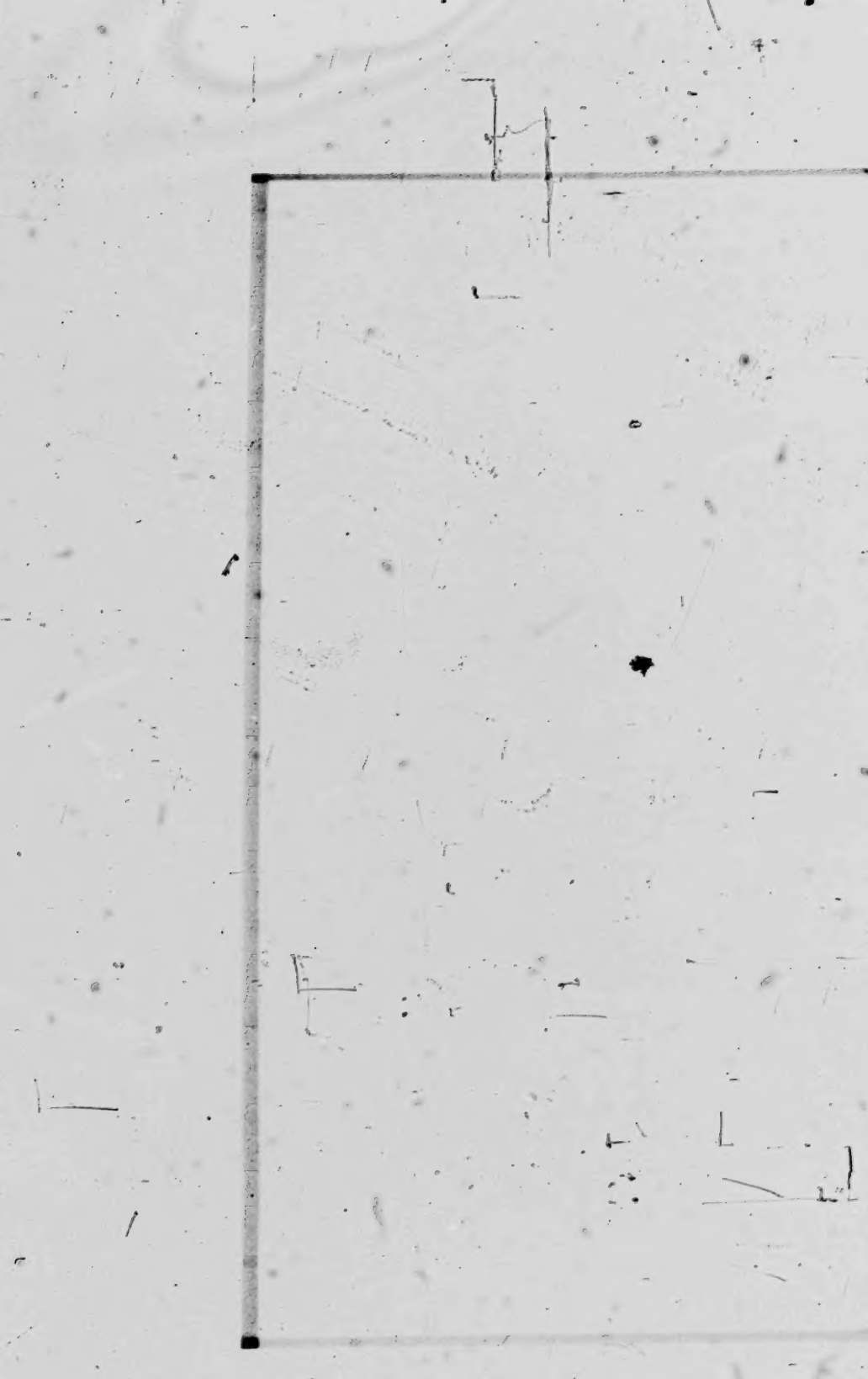
States v. Washington, 442 F.2d 1127 (9th Cir. 1971); United States v. Gregory, 472 F.2d 484, (4th Cir. 1973); United States v. Johnson, 427 F.2d 957 (5th Cir. 1970); Lemma v. United States, 387 F.2d 187 (8th Cir. 1968), cert. den. 391 U.S. 907; United States v. Miles, 413 F. 2d (3rd Cir. 1969) appealed after remand 468 F.2d 482; United States v. DeCarlo, 458 F.2d 358 (3rd Cir. 1972).

As we have mentioned, it was pointed out in DeSisto that the rule has been criticized in many quarters. We think, however, that much of the criticism has come from commentators such as McCormick, who have criticized the rule solely on the basis of the idea that a man's earlier testimony could many times be more accurate than his later testimony because generally people remember better at a time closer to the happening of an event. This reasoning may have merit in the abstract, but not one of the commentators recognized that other factors are much more important to preserve our inherent system of personal freedom, which includes the concept of a man being convicted only upon testimony that he is confronted with. People who criticize the rule do not take into account that the possibility of having false

testimony introduced by an unscrupulous police officer or prosecutor exists to a much greater degree at the grand jury level than it does at any other time. When a person alleges, such as in the case at bar, that his testimony was untrue or that he was forced or wrongfully induced to give that testimony, the principle of having a lawyer present at the time the testimony is given becomes significant. The idea that a man's testimony might be more truthful upon the occasion when he gives evidence before a grand jury holds no merit. I am sure that this court is aware that in many sections of our country there are movements to eliminate grand juries completely, on the grounds that they waste time and are a needless expense. In any event, whether one agrees with this idea or not, one can still recognize that there is substantial backing for such a movement, and that to a large extent the idea that grand juries do not perform a useful function has some merit. Inherent in this argument is the fact the grand juries usually hand down indictments whenever the prosecutor desires, and that witnesses generally will testify in a manner favorable to the prosecution, especially with intelligent prodding or direction on the part of law

enforcement. Many people think that grand juries do not serve a valid purpose. Certainly the testimony adduced before a grand jury should not have greater weight than any prior statements.

At any rate, this issue boils down to a determination of whether the exception granted in DeSisto applies to the case at bar or whether DeSisto is the law of the land at all. In the DeSisto case, the Court of Appeals recognized the general rule and recognized that proof of an out of court statement was generally not admissible except for impeachment purposes. An exception was granted, however, with respect to trial testimony or testimony before a grand jury, and in that case the evidence was admitted for its truth. It should be noted, however, that a significant factor in that case was that the evidence adduced before the grand jury was merely an identification of a photograph of the defendant. United States v. DeSisto, supra, Page 932. DeSisto did not deal with grand jury testimony such as is present in this case, and DeSisto did not deal with a situation where the witness himself said that his prior testimony was untrue or improperly coerced. These are differences which petitioner contends control the case at bar and make the DeSisto



exception inapplicable. The DeSisto exception was followed in United States v. Briggs, 457 F.2d 908 (2nd Cir. 1962), although that case only dealt with statements rather than grand jury testimony. Again, in United States v. Cunningham, 446 F.2d 194 (2nd Cir. 1971), cert. den. 404 U.S. 950, the exception was recognized. That case, like Briggs, did not involve grand jury testimony. Again, in United States v. Nacelli, 470 F.2d 67 (2nd Cir. 1972), it was made clear that the DeSisto exception was not intended to be extended. That case also involved a statement given to police rather than testimony before a grand jury.

The only case that specifically involved grand jury testimony was United States v. Insana, 423 F.2d 1165 (2nd Cir. 1970) cert. den. 400 U.S. 841, and we find the reasoning in that case merely points up the differences between the DeSisto situation and the case at bar. In Insana, it was said that certain situations could be present where a witness in good faith asserts that he cannot remember relevant events - that for some reason, such as a desire not to testify against someone, the witness refuses to testify, but he implicitly admits the truth of the extra-judicial

statement harmful to the defendant. United States v. Insana, supra, 1170. The Court then said:

> "Thus we believe that these statements are admissible not only to impeach his claim of lack of memory, but also as an implied affirmation of the truth. This conclusion is consistent with our qualification of the hearsay concept set forth in United States v. DeSisto ..."

Emphasis added, citation omitted. United States v. Insana, supra, 1170.

We believe that the Insana holding makes it clear that the intent of the Court was to allow grand jury testimony to be used only in situations where no issue was created regarding its truth or the method by which it came into being. Nothing could be clearer than the Court's statement that:

> "Where, as here, a recalcitrant witness who has testified to one or more relevant facts indicates by his conduct that the reason for his failure to continue to testify is not a lack of memory but a desire 'not to hurt anyone', then the court has discretionary latitude in the search for truth, to admit a prior sworn statement which the witness does not in fact deny he made."

United States v. Insana, supra, at 1170.

The case at bar clearly comes within the idea that Insana conveys. The case at bar involved a direct and substantial issue that the testimony before the

grand jury was not true, that the witness could not recall it and that he was heavily sedated and mistreated when he testified. In addition, in the case at bar, the grand jury testimony involved a substantial amount of questions and answers and was read at great length by the prosecutor. None of the cases which have been decided which permitted the use of grand jury testimony involved these issues. Even in DeSisto itself, the only grand jury testimony that was involved was a simple identification of the defendant. That identification was also made in the prior trial, so that no real issue of the truth of the grand jury testimony was presented. The facts of DeSisto and several other cases do not resemble the facts in this case, and the prejudice and dangers inherent in allowing grand jury testimony for its truth in a situation where the witness himself attacks that truth, is clearly indicated.

In the case at bar, the prosecutor even knew what would happen because McCormick had made his intentions clear before the trial and was already acting up when the openings began. (161A, 13A)

To allow the use of such testimony to the extent permitted here clearly violates Bridges v. Wixon, supra,

and deprives petitioner of a fair trial, the right to confront witnesses, cross examine witnesses and the right to counsel at the grand jury stage, which it turns out, is the most critical stage of the proceedings against him.

POINT II

PETITIONER'S STATEMENT, ALREADY RULED INADMISSIBLE, SHOULD NOT HAVE BEEN PERMITTED.

After petitioner made a statement in the United States Attorney's office, one which in no way was an admission of narcotics transactions, he indicated a desire not to answer any further questions. Thus, the court ruled that his conversation with Agent SCHNEPPER, on the way to the arraignment, was inadmissible. (133A-136A) The conversation came out on cross-examination, when petitioner testified, but most of it was a statement of fact by the agent, and as such, it should not have been allowed.

The agent told MATTEO that he, SCHNEPPER, knew MATTEO had done five to ten kilograms at a time and he wanted to know how many INDIVIGLIA, not a defendant at this point in the trial, when the response was elicited, had done. MATTEO replied that INDIVIGLIA was doing

INDIVIGLIA had lost his European connection. This statement in no way was an admission of guilt of the crime charged, it only showed knowledge of INDIVIGLIA's activities, and it was not in rebuttal or opposition to anything MATTEO said on direct examination. Even though statements such as this one, obtained in violation of Miranda v. Arizona, 384 U.S. 436 (1966), have been permitted on cross examination under certain circumstances, that idea is not universally accepted, and even where it is, it must impeach credibility by being contrary to something testified to on direct. Harris v. New York, 401 U.S. 222 (1971)

The rule prior to Harris was that statements in violation to Miranda were inadmissible for any purpose. Bosley v. United States, 426 F.2d 1257 (D.C. Cir. 1970); Groshart v. United States, 392 F.2d 172 (9th Cir. 1968). Harris seemed to change this in a one paragraph statement decided by a six to three majority, yet even the majority recognized its use was to contradict inconsistencies uttered from the witness stand. The dissent pointed out that Walder v. United States, 347 U.S. 62 (1954) did not compel the majority holding, but even so, it did not apply where the statement went to the issue to be proven rather than one of a collateral nature.

Harris v. New York, supra, 228-229. Thus, the harm of avoiding Miranda would not be so burdensome where the statement came in on a collateral issue such as to controvert a statement that two years before the defendant never dealt in narcotics at all, as was the situation in Walder. Where it comes in on the issue to be proven, not in response to a contrary claim by the defendant, it can only counter the spirit of Miranda itself and do by indirection what could not be done directly. In that way, the deterrant to unlawful police conduct is lost. Harris v. New York, supra, 231; United States v. Blocker, 354 F.Supp. 1195 (D.C. Cir. 1973)

Here, the petitioner never testified with relation to INDIVIGLIA. He was not a defendant and the statement was not relevant. In addition, the conversation consisted of more of a statement by SCHNEPPIR than WATTO, and its introduction was not to impeach anything petitioner had said on direct because he had not even testified in that area. Harris did not hold that just because a defendant testifies, anything he ever said could be brought out. Harris held that the statements could be used to impeach the credibility of the defendant who had just given testimony which was inconsistent with

the statements brought out on cross examination.

Here the statement was simply introduced on cross examination not in contradistinction of anything petitioner had said on direct but rather for the value of the contents of the statement itself.

Its only purpose was not to impeach but to intimate to the jury that if the petitioner knew of INDIVIGLIA's activities, he must have been involved himself. In this manner, the evidence came in directly on the issue of guilt, a happening which is not permitted by Harris or any other authority since.

This was a most important piece of evidence, since the jury called for it to be reread and then promptly convicted petitioner. (161A)

In addition, since Harris, the use of inadmissible statements on cross examination has become quite prevelant and unrestricted. It is important for the bar and bench in general to have more specific guidelines on the extent to which such statements should be used and for what purposes. If this question is dealt with, a considerable area of doubt may be eliminated.

POINT III

THE REBUTTAL TESTIMONY OF THE GOVERNMENT WENT FAR BEYOND PERMISSIBLE LIMITS, WAS IRRELEVANT AND SHOWED THE JURY ANOTHER CRIME WITH WHICH PETITIONER WAS NOT CHARGED.

When petitioner testified, he was asked some very innocuous questions in cross examination by the prosecutor. He was simply asked if he frequented the Club International and knew a JOSEPH ABBRUZZO. (146A-147A) MATTEO replied that he was there a few times, but said that he did not know ABBRUZZO. The prosecutor described the man as, "a guy about 5'8", rather lean, very nervous?", and the petitioner said he did not know him, but admitted that he may have, he did not know. (147A)

No further foundation was laid, when all of a sudden, like a bombshell, on rebuttal, one JOSEPH AVERSO, took the witness stand. Not only was his name different, but when asked if he could identify petitioner, he picked out a spectator, with great certainty, who turned out not to be MATTEO, but a Suffolk County cop. (150A-152A) Then AVERSO was told to look again and this time, with equal but prompted sureness, he identified the man at the

counsel table, petitioner. (152A)

The witness was then permitted to say not only that he had know petitioner from the Club International, but that he stayed at his house and purchased a large amount of heroin from his partner for a lot of money a few days later. (154A-155A) The witness described the events and conversations in great detail, even though petitioner was never charged with that crime.

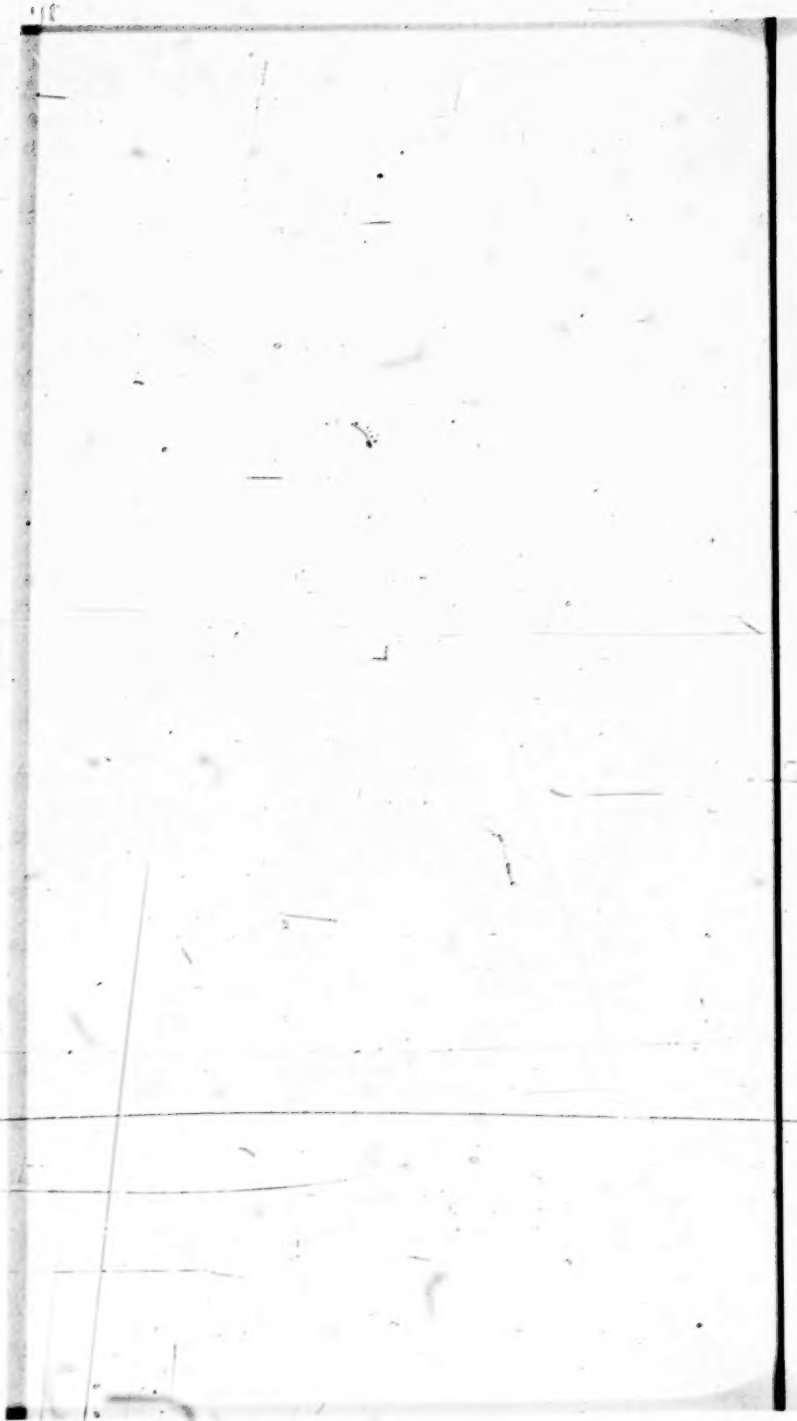
Petitioner recognizes that the Trial Court has great discretion in permitting the reception of rebuttal testimony, yet, it is equally recognized that rebuttal should only explain or contradict evidence offered in defense. United States v. Greenberg, 268 F.2d 120 (2nd Cir. 1959); United States v. Crowe, 188 F.2d 209 (7th Cir. 1971).

Still, rebuttal which contained little value with reference to issues in dispute should never be permitted where it shows evidence of other crimes. United States v. Tramaglino, 197 F.2d 928, cert. den. 344 U.S. 864 (2nd Cir. 1952); United States v. Chiarella, 184 F.2d 903, modified 187 F.2d 12, reargument denied, 187 F.2d 870, vacated 341 U.S. 946, cert. den. 341 U.S. 956 (2nd Cir. 1950); United States v. Kahaner, 317 F.2d 459,

cert. den. sub nom. Cocullo v. United States, 375 U.S. 835; Krogh v. United States, 375 U.S. 836, reh. den. 375 U.S. 926, 375 U.S. 982 (2nd Cir. 1963); Helton v. United States, 221 F.2d 338 (5th Cir. 1955).

In United States v. Kahaner, supra, at 471-472, the Court of Appeals, speaking through Judge Friendly, said that although the scope of rebuttal is largely discretionary, a Trial Court should exclude evidence showing the commission of other crimes: "'Where the minute peg of relevancy will be entirely obscured by the dirty linen hung upon it.'"

The statement of Judge Friendly applies even more aptly to this case than the one concerning which it was made. To allow a witness to detail a major narcotics transaction concerning which no charges were ever brought, just because petitioner could not recall if he ever met the man, is ridiculous. The situation becomes even more ludicrous when one realizes that petitioner would have honestly denied knowledge since the man's name was incorrectly pronounced by the prosecutor, the petitioner was not sure he did not know him and no foundation questions whatsoever were asked. When the added fact of witness' misidentification is added, his testimony



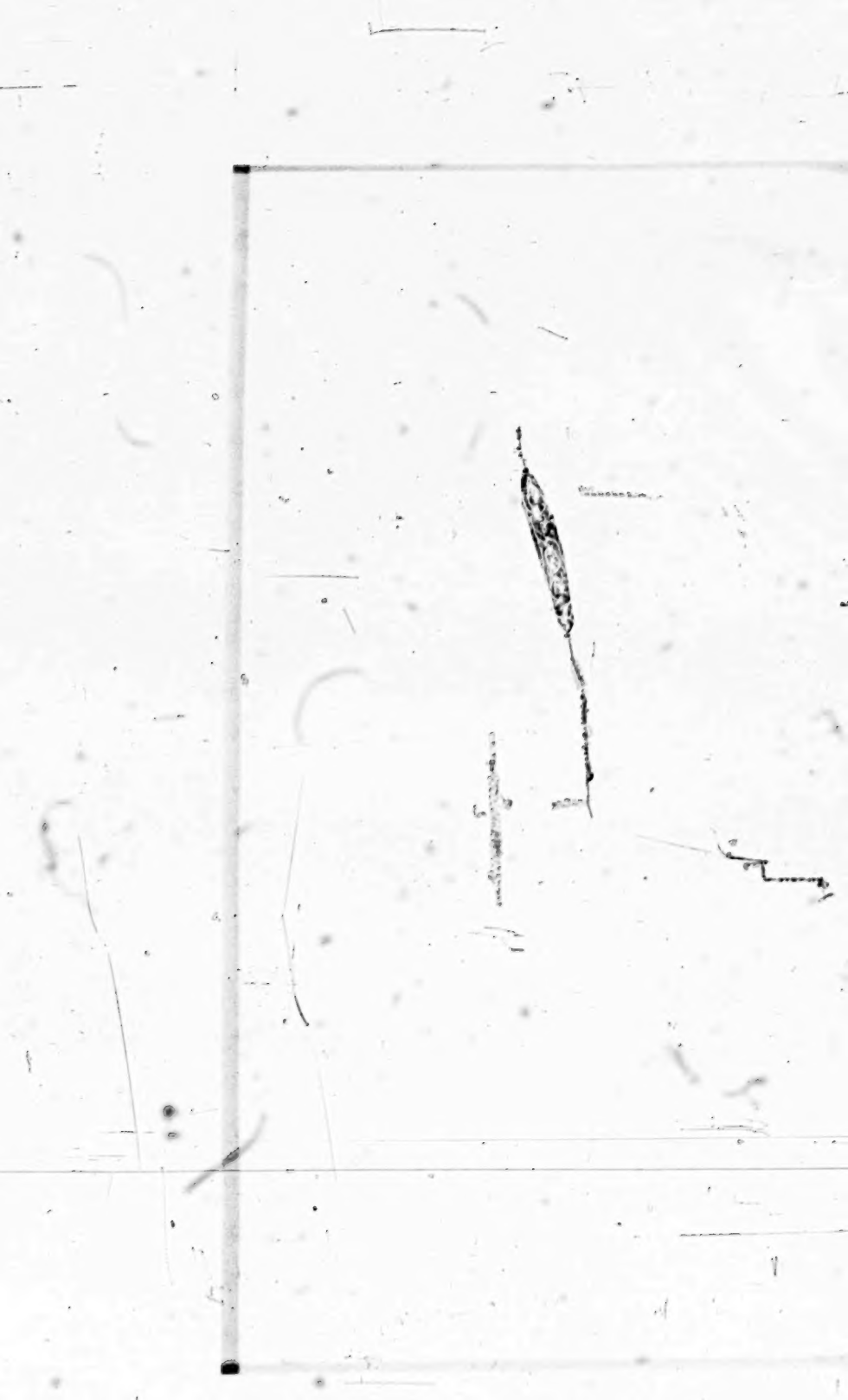
could have no reasonable relevance to this case, except to prove another crime and seriously prejudice the jury.

What happened in the case at bar goes against our traditional concepts of fairness, in that a defendant only be made to combat evidence tending to show he committed the crime for which he is then on trial. To allow the proof of other substantial crimes under a thin guise of impeachment is to create unfairness not warranted by the issue at bar and contrary to our system of justice. Petitioner could not have received a fair trial under these circumstances.

POINT IV

PETITIONER'S RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WAS NOT PROTECTED.

There can be no argument that the right to counsel under the Sixth Amendment contained the right to effective representation. Avery v. Alabama, 308 U.S. 444 (1969); Barber v. Nelson, 451 F.2d 1017 (9th Cir. 1971) The only question that must be answered in each case is whether the representation afforded so violates minimum standards that the Trial Court must take notice of the trial as being a mockery as



far as the defendant is concerned. United States ex rel Pugach v. Mancusi, 310 F.Supp. 691, aff'd. 441 F. 2d 1073, cert. den. sub nom Pugach v. Maldonado, 404 U.S. 849 (S.D.N.Y. 1970); Pinkard v. United States, 308 F.Supp. 938 (S.D.N.Y. 1970); United States v. Steed, 465 F.2d 1310, cert. den. 409 U.S. 1078 (9th Cir. 1972)

It has also been recognized that errors can be so great as to deny due process, even when retained counsel is involved, even though the standards may be more stringent. United States ex rel Pugach v. Mancusi, supra; Pinkard v. United States, supra; Arrastia v. United States, 455 F.2d 736 (5th Cir. 1972); Wilson v. Flood, 417 F.2d 1197, appeal after remand 457 F. 2d 106, cert. den. 409 U.S. 881 (7th Cir. 1969); Blanchard v. Brewer, 429 F.2d 89, cert. den. 410 U.S. 1002 (8th Cir. 1970); United States ex rel O'Brien v. Maroney, 423 F.2d 865 (3rd Cir. 1970)

In the case at bar, the representation afforded was devoid of any degree of competence.

There was no objection whatsoever to the government's extensive use of the grand jury testimony of JAMES McCORMICK, no attempt to keep it out, or at the

least, seek limiting instructions. The only objection taken was some time later, after a lunch break, when counsel realized he might have made a mistake. (539-540) There was no objection to the rebuttal witness, JOSEPH AVERSO, to any of his testimony, or even a claim that other crimes were being shown. There was no objection to the government's use of petitioner's conversation with Agent SCHNEPPER, but rather, counsel indicated that he thought the prosecutor could ask the question. Here, too, at the very least, no limiting instructions were sought, nor were specific charges asked for with relation to the evidence or the use which the jury could make of McCORMACK's grand jury testimony. It is not impossible to surmise that when counsel put WHITE on the witness stand, he had no idea that the government could even try to get into the area of WHITE's conversation with the agent.

There was no attempt to keep out proof of the shooting of WHITE and the $350,000.00 found near his body, an event that had nothing to do with this case, and must have been highly prejudicial. In fact, the attorney first brought the matter into the trial when

he was cross examining FRANK AGUIAR (237-248). When appellant counsel brought this out on sentence, the Court remarked that trial counsel had wanted it in the case. Then, although the damage had been done, no objection was interposed when the government put on police witnesses to describe how MATTEO was found (139A-144A), or to a complete detailing of all the narcotics paraphernalia found in INDIVIGLIA's house, which had nothing to do with the case. In fact, all the items were received in evidence without objection. (144A) There was no attempt to prevent the revelation that a gun was found next to MATTEO, and no attempt was made to prevent the money from coming in. (128A-129A)

In short, not one single objection of substance was raised which seemed to protect petitioner's rights or preserve the record.

Petitioner might just have well gone to trial pro se. At least, the Court would have helped him.

CONCLUSION

THE PETITION FOR CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

STANLEY M. MEYER
Attorney for Petitioner
66 Court Street
Brooklyn, New York 11201

PREMINGER, MEYER & LIGHT
Of Counsel

Order of Affirmance

UNITED STATES COURT OF APPEALS

For The

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eleventh day of February one thousand nine hundred and seventy-five.

Present: HON. IRVING R. KAUFMAN
Chief Judge

HON. JAMES L. OAKES

HON. MURRAY I. GURFEIN

Circuit Judges

- X

UNITED STATES OF AMERICA,

Plaintiff-Appellee, 74-2570

v. 74-2319

THOMAS MATTEO, FRANK BREEN, JOHN INDIVIGLIO, 74-2355

Defendants-Appellants.

- X

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO,
Clerk

By VINCENT A. CARLIN,
Chief Deputy Clerk

SUPREME COURT, U.S.
2

FILED
FEB 28 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1143

JOHN INDIVIGLIO,

Petitioner.

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOSEPH WINSTON
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New York, New York 10017
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IN THE

Supreme Court of the United States

October Term, 1974

No. _____

JOHN INDIVIGLIO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE WARREN E. BURGER, CHIEF JUSTICE OF THE UNITED STATES, AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, JOHN INDIVIGLIO, hereby petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit affirming the decision and judgment rendered in favor of the appellee herein and against appellant in the United States District Court for the Eastern District of New York for conspiracy and violations of Sections 173 and 174 of Title 21 U.S.C. prior to May 1, 1971 and after May 1, 1971, the violation of Sections 812, 841(a)(1), 841(b)(1)(a), 951(a)(1) and 952 of Title 21 United States Code.

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED

Your petitioner was convicted of conspiracy in spite of the uncontroverted facts where there is no direct evidence linking petitioner with a conspiracy. The only "evidence" linking petitioner to the conspiracy was hearsay by a fellow co-conspirator. There was no corroboration independent of his testimony. The decision was affirmed despite the fact that the jury was permitted over objection to hear, for a second time, a portion of the prosecutor's summation. The defendant, JOHN INDIVIGLIO, is sixty (60) years of age, was never previously convicted of any crime and was sentenced to twelve (12) years of confinement and to special parole of five (5) years.

The record is clear that nobody (a) ever found narcotics in the possession of INDIVIGLIO; (b) purchased any narcotics from him; (c) sold any narcotics to him; or (d) paid any money to him for narcotics. The entire case of the Government rests, admittedly, on circumstantial evidence.* As the Government argued successfully in its brief before the Circuit Court:

> "However, the independent evidence may be entirely circumstantial, United States v. Manfredi, 488 F.2d 588, 596 (2d Cir. 1973), and each piece of evidence should be viewed in conjunction with and drawing color from every other piece of relevant evidence. United States v. Geaney, supra at 1121."

After all the sides had rested, the jury requested a re-reading of the prosecutor's summation. In a case involving only circumstantial evidence against this defendant, the re-reading of the prosecutor's summation tipped the scale against him.

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* Attached as an Appendix is a short summary of the Government's case against Indiviglio.

II.

BASIS OF JURISDICTION

The jurisdiction of this Court is invoked under Sec. 1254(1) of Title 28 U.S.C. in that the petitioner has been deprived of his privileges under the Sixth and Fourteenth Amendments of the United States Constitution.

OPINION BELOW

There was no written opinion by the Circuit Court of Appeals. On January 29, 1975, at the conclusion of arguments by all counsel, the Court orally affirmed the jury conviction of the Court below.

III.

QUESTIONS PRESENTED

1. (a) Whether a court may consistent with due process of law required by the Fourteenth Amendment find that there is participation in a criminal conspiracy by the defendant despite the fact that there is no direct evidence linking the defendant to any crime, and despite the fact that the only evidence adduced during the trial was the hearsay evidence of alleged co-conspirators.

(b) May hearsay evidence of alleged conspirators constitute independent proof of participation sufficient to sustain a conviction without any corroboration?

(c) If independent corroboration is not required, does not this finding abrogate the rule of this Court that there must be evidence, independent from co-conspirators, in order to find a defendant guilty and that this independent evidence cannot be so-called statements from co-conspirators.

2. (a) Whether the court should have permitted the jury to re-hear the prosecutor's summation a second time although all parties conceded that the summation is not evidence.

(b) In this particular case where there was no direct evidence and only hearsay evidence of a co-conspirator, did the wrongful re-reading of the prosecutor's summation prejudice defendant by attaching the court's imprimatur to the prosecutor's theory of the case.

IV.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

In its brief before the Circuit Court of Appeals, the attorney for the United States argued quite candidly:

(a) That although the case was built upon circumstantial evidence only, taking all the circumstantial evidence in order, there was sufficient basis for the jury to find the defendant guilty.

(b) The Government's counsel also conceded on the oral argument before the Second Circuit Court of Appeals that he found no legal precedent for a re-reading of a portion of the prosecutor's summation to the jury a second time.

Re: Point (a)

In order to convict the defendant, we have only the evidence of alleged co-conspirators who testified as to admissions by the defendant. The only testimony really implicating the defendant was told by Mr. Tyler Somas, a convicted felon who was incarcerated, and his girlfriend, later wife, FAY SOMAS, likewise a felon. Mr. Somas would, of course, say and do anything to get his liberty. The well established rule, both in the United States Supreme Court, *Brown v. United States,* 150 U.S. 93 (1893), and in the Second Circuit, is as follows (*United States v. Santana,* 503 F.2d 710 (2d Cir. 1974)):

> "The settled rule in this Circuit, see United States v. Geaney, 417 F.2d 1116, 1120 (1969), cert. denied, sub. nom. Lynch v. United States, 397 U.S. 1028, 90 S.Ct. 1276, 25 L.Ed.2d 539 (1970) is that the jury will be permitted to consider such hearsay only if the trial judge determines that the prosecution has proved the defendant's participation in the conspiracy by a fair preponderance of the evidence independent of co-conspirators' declarations."

See also, *United States v. Ragland,* 375 F.2d 471 (2d Cir. 1967) cert. den. 390 U.S. 925 (1968); *United States v. Marrapese,* 486 F.2d 918, 921 (2d Cir. 1973) cert. den. 415 U.S. 994 (1974; *United States v. D'Amato,* 493 F.2d 359 (2d Cir. 1974); *United States v. Santana,* 503 F.2d 710 (2d Cir. 1974); *United States v. Mallah,* 503 F.2d 971 (2d Cir. 1974).

However, this rule is reduced to a nullity in practice because the Second Circuit takes the position that if a conspirator alleges *that he heard the defendant Indiviglio make damaging admissions,* this is sufficient independent proof of participation in the conspiracy. No corroboration is required for conviction. With this in mind, the Second Circuit affirmed on the ground that we have admissions by the defendant with regard to his participation in the conspiracy. But these alleged admissions come from co-conspirators and if permitted by this Court would in effect destroy the rule itself. For the purpose of all the Circuits, the United States Supreme Court should affirm the rule that there must be evidence independent of hearsay, independent from co-conspirators in order to find the defendant guilty and *this evidence cannot be so called statements from co-conspirators that they heard incriminating facts from the defendant.*

Re: Point (b)

In a case with no direct evidence against JOHN INDIVIGLIO, the Court, over objection of defendant's counsel, permitted the

jury to listen a second time to a portion of the prosecutor's summation which the jury had requested. Since all parties conceded that a prosecutor's summation is not evidence, this re-reading of the prosecutor's summation tipped the scales against INDIVIGLIO.

In oral argument before the Second Circuit, the Government, with admirable frankness, concedes that there is no precedent on the subject. However, there is a precedent against permitting a defense counsel's summation to be reread to the jury and the same rule should apply to a prosecutor's summation.

In the only reported Federal case in which a defense counsel's summation was requested by a jury, *United States v. Guanti*, 421 F.2d 792 (2d Cir. 1970), the Court stated at page 1160(a) of the record on appeal:

> "I have a copy of your note asking for a copy of Mr. LaRossa's summation. You can't have that. That's not evidence. That is an argument. You will have to remember it if you can remember it. He doesn't have two arguments."

On appeal, there was cited as error the supplementary charge given to the jury after they had been out for twenty-four (24) hours. The Circuit Court of Appeals stated at 801:

> "There is also assigned as error a supplementary charge given to the jury after it had been out for 24 hours. The jury returned a verdict of guilty as to all defendants five to twenty minutes after the supplementary instruction. *The jury requested a summation of Dominick's counsel. Since this was not evidence, the request was denied.* The trial judge then gave a restatement of the elements of conspiracy with a statement of the law relating to withdrawal. He did not give a specific charge as to Dominick since he feared that that would suggest that withdrawal was the only issue as to him or that only his guilt was

questionable. This was not objected to as an erroneous statement of law but as unresponsive to the request. There was no error in giving this instruction." (my emphasis)

Guilt by Association Should not be Encouraged But Discouraged

The denial of a writ in this case would place great emphasis upon guilt by association, a doctrine which should have been buried with the end of the era of McCarthyism.

We all know, lawyers as well as judges, of the catalogues of prosecutorial evils inherent in a conspiracy trial. Inevitably, in a conspiracy trial, the focus of attention shifts from individual guilt toward guilt by association. While all Courts agree and affirm that mere association with others is not evidence to support a guilty verdict (*United States v. Arroyave*, 477 F.2d 157 (5th Cir. 1973); *United States v. DiRe*, 159 F.2d 818 (2d Cir. 1947) aff'd. 332 U.S. 581 (1958); *Ong Way Jong v. United States*, 245 F.2d 392, 394 (9th Cir. 1957)), this rule is often overlooked in the fracas of an actual trial. Since in a conspiracy prosecution, the act of any alleged conspirator is attributable to the other, is admissible in evidence, with hearsay evidence going so far as to violate one's constitutional right to confront one's accusers, then the rule against guilt by association becomes terribly diluted. Such, we respectfully submit, is the case here with Mr. Indiviglio.

Obviously, it was, therefore, crucial for the prosecution as part of its case to prove an agreement existed between Aguiar, McCormack and Indiviglio. A reading of the testimony of Somas reveals that he never saw any narcotics transactions involving John Indiviglio. Fay Somas testified that she never saw Indiviglio sell any drugs. However, after being prodded by the U.S. Attorney, she says that she heard that Mr. Indiviglio was importing drugs into the United States via automobiles. Aguiar testified that McCormack says he got heroin from Indiviglio.

McCormack never took the stand and never testified about

anything. It, therefore, becomes crucial on the part of the prosecution to have independent testimony about Indiviglio's part in this alleged conspiracy and overt acts other than hearsay testimony. It is well known that there must be evidence of both an agreement and an overt act to establish a crime of conspiracy. An overt act without an agreement is insufficient. See *United States v. Williams*, 503 F.2d 50 (6th Cir. 1974):

> "Thus, with regard to Johnson, there is at most the showing of an overt act. This is insufficient to sustain a conspiracy conviction. United States v. Sarno, 456 F. 2d 875 (1st Cir. 1972); Schnautz v. United States, 263 F.2d 525 (5th Cir., 1959); Hall v. United States, 109 F.2d 976 (10th Cir., 1940); cf. Condrey v. United States, 351 F.2d 456 (5th Cir., 1965)."

But in this sense, the case is barren of any evidence, as opposed to suspicion that defendant Indiviglio illegally acted. When viewed in the cold light of reason, the most that could be said is that suspicions are aroused. But this does not permit a conviction of a sixty (60) year old man heretofore never convicted of any crime to rest on mere suspicion or surmise, or inference drawn upon inference. Some direct evidence had to go in, independent of co-conspirator's statements, in order to sustain a conviction of Indiviglio. This we submit is plainly lacking in this case.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and proceedings of the said United States Court of Appeals for the Second Circuit in the case numbered and entitled on its Docket No. 74-2319, UNITED STATES OF AMERICA v. JOHN INDIVIGLIO, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment

herein of said United States Court of Appeals for the Second Circuit be reversed by the Court, and for such further relief as to this Court may be proper.

Dated February 26, 1975.

Respectfully submitted,

JOSEPH WINSTON
Attorney for Petitioner
101 Park Avenue
New York, New York 10017
(212) MU 6-6780

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

JOHN INDIVIGLIO, being duly sworn, deposes and says:

That he is the petitioner in the within proceeding, that he has read and knows the contents of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit, that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those he believes it to be true.

John Indiviglio
JOHN INDIVIGLIO

Sworn to before me this 26th
day of February, 1975

Joseph Winston
JOSEPH WINSTON
Notary Public, State of New York
No. 41-9707900
Qualified in Queens County
Term Expires March 30, 1976

The first witness to appear for the prosecution was one Somas, a convicted felon. He really could say very little about implicating defendant Indiviglio in any direct transaction involving heroin. On A16 appears this testimony:

"Q Were you present when heroin was given to Mr. Matteo or Mr. James McCormack by the defendant Mr. Indiviglio?

A No I wasn't."

Under prodding by the Assistant U.S. Attorney, we have this question and answer (A18):

"Q I ask you again, Mr. Somas, whether or not you were present when Mr. Indiviglio gave any drugs to either Mr. Matteo or Mr. McCormack?

A I believe he might have given some to Mr. Matteo. You see, the samples were usually left in a place where Mr. Matteo would pick them up and give them to Mr. McCormack and Mr. McCormack would try them.

Now, there might have been an occasion I was there when John handed them over. I'm not positive. It was a long time ago and my memory just is not that good."

Outside of this, we then have testimony that Mr. Somas had a conversation with Mr. Matteo where he stated that Indiviglio gets a connection for heroin in France (A22). This was the sum and substance of his testimony. He confirmed that there were no illegal drugs in Indiviglio's apartment (A27).

Fay Somas, his girlfriend and then his wife, testified that she saw different people delivering heroin (Matteo, Breene (A31)) but never Mr. John Indiviglio (A140):

"Q Was there any discussion of narcotics at that time?

A We didn't actually bring out the words heroin or drugs. They were discussing about the money that John had made.

Q What was said?

A John said he made millions.

Q Who had asked him?

A Tyler did.

Q Do you remember the words that Tyler used?

A I believe he just asked, approximately how much did he make during the years, and John replied, millions.

Q Was there any other discussion after that?

A They discussed a foreign car that John was importing into the United States.

Q What was said about that car, that foreign car?

A Tyler asked if he still had any left and John said yes, he had one."

Then was this question and answer (A41):

"Q Did Mr. Indiviglio say why he was importing cars into the United States?

A No, he didn't come right out and say why.

Q He didn't?

A No.

Q Did you tell me in my office on Sunday

MR. KRIEGER: Objected to your Honor.

THE COURT: The jury may be excused. (At 2:14 p.m., the jury withdrew from the courtroom and the following occurred out of hearing . . ."

This was the total amount of testimony with regard to FAY SOMAS. Aguiar had no direct relations with defendant Indiviglio. On A54 appeared this testimony:

"Q During the spring and summer of 1968, did you have any contact with a man named James McCormick?

A Yes.

Q How did you meet him?

A I met him through my brother-in-law but I had known him for a while before that anyway, you know, through the neighborhood.

Q What was Mr. McCormick doing for a living at that time, do you know?

A He was in the heroin business.

Q Did he tell you that?

A I cut some material in his apartment for him. It was his material.

Q What do you mean by material?

A Heroin. I cut it down.

Q Did he tell you where he got that heroin from?

A Yes.

Q What did he say?

A From Indiviglio, Charles Indiviglio.

Q What color was that?"

Then once again we have hearsay that McCormack told him that Indiviglio was supplying the heroin (A55). In more than 100 pages of testimony, this is the only reference to John Indiviglio.

Breene testified that he had absolutely no transactions with Indiviglio (A96):

"Q Now did you ever engage in any business or any partnership or any agreement or arrangement with either Mr.

Somas, Mrs. Somas, Mr. Aguiar, Mr. Indiviglio, Mr. McCormack, that have been mentioned in these past few days for the sale, distribution, storing, buying, selling or having anything to do with narcotics?

A No, sir."

The indictment charges that between October, 1967 and September 27, 1972, defendant, JOHN INDIVIGLIO, did conspire with FRANK AGUIAR and JAMES McCORMACK to violate the Narcotics Law.

Obviously, it was, therefore, crucial for the prosecution as part of its case to prove an agreement existed between Aguiar, McCormack and Indiviglio. A reading of the testimony of Somas reveals that he never saw any narcotics transactions involving John Indiviglio. Fay Somas testified that she never saw Indiviglio sell any drugs. However, after being prodded by the U.S. Attorney, she says that she *heard* that Mr. Indiviglio was importing drugs into the United States via automobiles. Aguiar testified that McCormack says he got heroin from Indiviglio.

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1085
THOMAS MATTEO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 74-1143
JOHN INDIVIGLIO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 74-6161
FRANK BREEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The court of appeals affirmed without opinion.

JURISDICTION

The judgment of the court of appeals (No. 74–1085, Pet. App., pp. 36–37) was entered on February 11, 1975. The petitions for writs of certiorari in Nos. 74–1085 and 74–1143 were filed on February 28, 1975, and the petition in 74–6161 was filed on March 10, 1975.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Petitioner in No. 74–1085 presents the following questions:

1. Whether the grand jury testimony of a recalcitrant government witness was properly admitted for impeachment purposes.

2. Whether a testifying defendant's out-of-court admission, made while in custody in the absence of *Miranda* warnings, was properly used for impeachment purposes upon cross-examination.

3. Whether the government's rebuttal evidence against petitioner Matteo was properly admitted.

4. Whether petitioner Matteo was denied the effective assistance of counsel.

Petitioners in Nos. 74–1143 and 74–6161 present the following questions:

5. Whether there was sufficient evidence of participation in the conspiracy by petitioners Indiviglio and Breen.

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[1] The petition in No. 74–1143 was originally filed in typescript on February 28, 1975, and it was returned to counsel on that date. Printed copies were filed on March 10, 1975, and the case was then docketed as of the earlier date.

6. Whether the trial court abused its discretion in rereading the government's final argument to the jury.

Petitioner in No. 74–6161 additionally presents the following questions:

7. Whether an out-of-court admission, made by petitioner Breen while intoxicated, was admissible in evidence.

8. Whether certain grand jury testimony and other sealed reports should have been furnished to petitioner Breen.

STATEMENT

Following two separate jury trials in the United States District Court for the Eastern District of New York, petitioners were convicted of conspiring to import and distribute heroin, in violation of 21 U.S.C. (1964 ed.) 173 and 174 (for transactions occurring prior to May 1, 1971), and 21 U.S.C. 812, 841(a)(1), 841(b)(1)(A), 951(a)(1), and 952 (for transactions occurring after May 1, 1971).[2] Petitioners received the following sentences: Matteo, ten years' imprisonment and a special parole term of five years; Indiviglio, twelve years' imprisonment and a special parole term of five years; Breen, seven and one-half years' imprisonment and a special parole term of five years.

---

[2] Petitioners were charged in a single-count indictment with conspiring with unindicted co-conspirators Frank Aguiar and James McCormack. Petitioner Indiviglio's case was severed prior to the first trial. Petitioner Breen's case was severed during the first trial. Accordingly, petitioner Matteo was tried alone and convicted on June 14, 1974. Subsequently, petitioners Indiviglio and Breen were tried together and convicted on August 16, 1974.

Briefly summarized, the overlapping evidence adduced at the two trials revealed the existence of a conspiracy pursuant to which large quantities of heroin were imported from France and distributed to buyers in the United States. Although membership in the conspiracy changed from time to time, the core membership and the purpose of the conspiracy remained intact. Petitioner Indiviglio's role in the conspiracy was that of the main importer of heroin from French sources; petitioners Matteo and Breen functioned as major distributors of heroin within the United States.

A. THE TRIAL OF PETITIONER MATTEO

In the summer of 1968, Frank Aguiar, the government's principal witness, was in the business of selling heroin. His source of supply was Tyler Somas. Unhappy with the quality of heroin that he was receiving, Aguiar met with Somas and petitioner Matteo. At that time, Matteo promised Aguiar that he would receive better heroin in the future. Thereafter, Aguiar continued to receive small amounts of heroin from Somas (Tr. I, 134–137).[3]

In the fall of 1969, Aguiar again met with petitioner Matteo, who was accompanied by petitioner Breen. Matteo asked Aguiar how much money he had made from his narcotics dealings since their first meeting. Aguiar stated that he had made approximately $67,000.

---

[3] "Tr. I" refers to the transcript of petitioner Matteo's trial; "Tr. II" refers to the transcript of the trial of petitioners Indiviglio and Breen.

Matteo was puzzled at this response because he had received only $2,000 from Somas. Matteo said that he would get to the bottom of the matter of payments and also indicated that thereafter Aguiar would be dealing directly with him and Breen (Tr. I, 141–143). In November 1969, petitioners Matteo and Breen went to Aguiar's apartment and asked to borrow $16,000 in order to finance a heroin business dealing in larger quantities. They offered Aguiar a partnership in exchange for a loan. Aguiar stated, however, that he would lend the money only if they agreed to furnish him with uncut heroin at cost (Tr. I, 147–150, 353–354). A few days later, Aguiar gave $16,000 to Matteo and Breen (Tr. I, 150).

Several days later, Matteo and Breen brought a kilogram of heroin to Aguiar's apartment, where it was divided into eight packages. Thereafter, Matteo and Breen took the heroin and left (Tr. I, 150–151, 355–356). A few days later, Breen returned to Aguiar's apartment and asked Aguiar to store the packages of heroin. Subsequently, either Matteo or Breen picked up the heroin (Tr. I, 152–154).

Throughout 1970, Aguiar purchased progressively larger quantities of heroin from Matteo; in the latter part of the year, he was purchasing three kilograms at a time (Tr. I, 158–159). Between November 1970 and January 1971, Aguiar and Matteo conducted their heroin dealings as partners; they earned $170,000 in profits during those months. Following dissolution of that partnership, Matteo continued to supply heroin to Aguiar (Tr. I, 161–163).

Aguiar made increasingly larger purchases, culminating in a series of ten-kilogram transactions (Tr. I, 163–164). In September 1972, Aguiar arranged to buy another ten kilograms of heroin through Matteo, for a total price of $270,000. Matteo was to make the purchase by using $190,000 of his own money (representing a debt that he owned Aguiar) and additional monies to be supplied by Aguiar. Aguiar was to deliver $60,000 in cash to Matteo in advance and an additional $20,000 when the narcotics were received. Aguiar delivered the $60,000 (Tr. I, 172–174); however, the following day, Matteo was found shot (not fatally) in the home of petitioner Indivigilo (Tr. I, 520–521). The police also found an attache case near Matteo's body, containing $350,000 in cash (Tr. I, 524).

B. THE TRIAL OF PETITIONERS INDIVIGLIO AND BREEN

In the spring of 1968, Matteo approached Somas to arrange a business deal whereby Somas would manage Matteo's heroin business (Tr. II, 26). At that time, Matteo was living in an apartment building owned by petitioner Indiviglio, the basement of which contained a laboratory (Tr. II, 27–28). On one occasion, Matteo and Somas picked up some dark brown heroin samples that had been left in the laboratory and delivered them to James McCormack, who tested the samples (Tr. II, 29, 31, 35–36). McCormack told Aguiar that he was dealing in heroin supplied by Indiviglio (Tr. II, 236), and he explained that the heroin was brown because it had been damaged in shipment and then treated by Indiviglio (Tr. II, 238).

Matteo instructed Somas to provide petitioner Indiviglio with any funds he might need in order to travel to France to arrange a source of heroin (Tr. II, 37–38, 40). Thereafter, Matteo, Somas, and Indiviglio held a meeting during which Indiviglio said that he was planning a trip to Europe (Tr. II, 41–42). Several months later, Indiviglio asked Somas for $5,000 for a trip; however, Somas was only able to give him $3,000 (Tr. II, 43–44). Upon his return, Indiviglio said that someone in Newburgh, New York, had "taken his connection away". Indiviglio stated that a letter relating to a shipment was being sent to the person in Newburgh and asked Somas to go to Newburgh and steal the letter (Tr. II, 44–45).

In early 1969, Somas began purchasing small amounts of heroin from petitioner Breen (Tr. II, 49–50). Somas was in turn supplying heroin to Aguiar. After Aguiar complained to petitioner Matteo about the quality of heroin that he was receiving from Somas, Breen undertook to supply Aguiar directly and did so on two occasions (Tr. II, 241–244).

In the fall of 1969, Aguiar agreed to lend Matteo and Breen $16,000 to be used in their heroin dealings, provided that he be given an option to purchase uncut heroin at cost (Tr. II, 247–248). Soon thereafter, Matteo and Breen brought a kilogram of heroin to Aguiar's apartment to be divided into ⅛-kilogram packages (Tr. II, 88, 249–250). A few days later Breen returned to the apartment and asked Aguiar to store three packages of heroin, which Breen and Matteo subsequently picked up (Tr. II, 250–251, 254).

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In 1970, Breen told Aguiar that he and Matteo were no longer in partnership (Tr. II, 255). Nonetheless, Breen continued to supply heroin to Somas on at least seven occasions, the last of which involved delivery of one pound of heroin (Tr. II, 167–168, 173–175).

During this time, petitioner Indiviglio told Somas's wife that he had made "millions" in the narcotics business by importing foreign cars containing caches of heroin (Tr. II, 180–181. 183–184, 219–220).

In September 1972, Matteo was found in Indiviglio's home. He had been shot five times in the back but was still alive. Next to Matteo was an attache case containing $350,050 in cash (Tr. II, 364, 369). Police officers also found laboratory equipment used in the processing of heroin (Tr. II, 382–384).

ARGUMENT

1. James McCormack, an unindicted co-conspirator, was called as a government witness. After testifying that he knew petitioner Matteo and had met with him in 1967 or 1968 (Tr. I, 460–463), McCormack claimed that he was unable to remember any events that would incriminate Matteo.[4] Thereafter, the government was permitted to use McCormack's detailed grand jury testimony in an attempt to refresh his memory and, in the alternative, for the purpose of impeachment (Tr.

[4] Before he testified, McCormack was examined by the court. McCormack claimed at that time that he could not recall his dealings with Matteo. The court then held McCormack in contempt (Tr. I, 440), ruling that he was willfully refusing to answer questions (Tr. I, 437–438, 444).

I, 468–497).[5] For the most part, McCormack testified that he could not recall whether or not he had given the testimony set forth in the grand jury record.

Petitioner Matteo incorrectly contends (Pet. 15–24) that the trial court erred in allowing the government to use McCormack's grand jury testimony for impeachment purposes. A court may properly admit a witness's prior statement as impeachment evidence if it is inconsistent with his testimony at trial. *Grunewald* v. *United States*, 353 U.S. 391, 418. In this case, it was clear that McCormack was merely feigning a faulty memory in order to protect Matteo. As the trial judge observed (Tr. I, 514):

> Not once did [McCormack] complain of being sick while he was under cross examination. On cross examination he answered every question asked by [petitioner's trial counsel]. He remembered matters that occurred at a time earlier to [*sic*] the time he appeared before the Grand Jury.
>
> He was quite articulate in describing the programs that he received in State custody.
>
> It is clear to me that this witness never intended to testify directly or give testimony that was required of him; that he answered

[5] Petitioner Matteo mistakenly intimates that the grand jury testimony was introduced as substantive evidence. Following the objection of petitioner's trial counsel (Tr. I, 539–540), the court stated: "[T]o the extent that [McCormak] refused to admit any of the statements, I would say that it is not admissible under the substantive crime" (Tr. I, 541). Thereafter, the court's jury instruction on prior inconsistent statements limited their consideration to "judging the credibility of the witness" (Tr. I, 742–743).

> questions that inculpated himself, but refused to answer questions that inculpated [petitioner] Matteo.

Accordingly, the court was well within its discretion in allowing the use of McCormack's prior inconsistent grand jury testimony for impeachment purposes.

As the Second Circuit held in the similar case of *United States* v. *Insana*, 423 F. 2d 1165, 1170 (C.A. 2), certiorari denied, 400 U.S. 841:[6]

> Where * * * a recalcitrant witness who has testified to one or more relevant facts indicates by his conduct that the reason for his failure to continue to so testify is not a lack of memory but a desire "not to hurt anyone," then the court has discretionary latitude in the search for truth, to admit a prior sworn statement * * * [T]he trial judge's hands should [not] be tied where a witness does not deny making the statements nor the truth thereof but merely falsifies a lack of memory.[7]

---

[6] In *Insana*, the witness responded "If he says I said it, I guess I did"; and "I don't remember"; and "If he has it on the record I guess I must have"; and finally, "I don't recall" (423 F. 2d at 1168). In the instant trial, McCormack's responses included, "I recall the conversation, but not that question and not that answer" (Tr. I, 470); "That sounds familiar. I am not positive" (Tr. I, 471); "It may be down there, but I don't remember those questions at all" (Tr. I, 476); "At the moment I can't think at all" (Tr. I, 484); and "I am not sure at this time" (Tr. I, 487).

[7] The court in *Insana* held that such statements were admissible as substantive evidence. See also *California* v. *Green*, 399 U.S. 149; Rule 801(d)(1) of the Federal Rules of Evidence (effective date, July 1, 1975). *A fortiori*, the district court here had discretion to admit McCormack's prior statements for impeachment purposes.

2. Following his arrest, petitioner Matteo made inculpatory statements to a government agent. At a pretrial hearing, these statements were suppressed on the ground that they had been made in the absence of *Miranda* warnings. The statements were, however, used for impeachment during the course of the cross-examination of Matteo. Petitioner Matteo claims (Pet. 24–27) that that use was improper.

At trial, Matteo testified in his own behalf. He admitted that he was involved in illegal gambling operations but denied that he had been trafficking in narcotics (Tr. I, 575–578). On cross-examination, Matteo again denied involvement in the drug trade, stating that he had never purchased or sold heroin at any time (Tr. I, 593). Although Matteo admitted knowing of petitioner Indiviglio's involvement in the narcotics trade, he said that this knowledge came from a single conversation in which Indiviglio had acknowledged that he was once involved with narcotics (Tr. I, 605–606). Thereafter, the trial court allowed Matteo to be cross-examined concerning the inculpatory statements that he made while in custody (Tr. I, 612–613):

> Q. In that conversation, do you recall that Agent Schnepper said to you that he was aware that you had done [five] to [ten] kilograms of heroin at a time but wanted to know what Indivigli[o] was doing, and that you responded that Indivigli[o] was doing 30 to 40 kilograms at a time. Do you recall that conversation?
>
> A. Yes.
>
> Q. Is that what you said?
>
> A. Yes, that's right.

> **Q. Did you also state that Indvigli[o] had lost his European connection a while ago, because the connection had gotten jammed up with the police in France?**
>
> A. Right.

Petitioner voluntarily elected to take the stand in his own defense and was, therefore, properly subjected to "the traditional truth-testing devices of the adversary process." *Harris* v. *New York*, 401 U.S. 222, 225. The impeachment use of his prior admission was proper. *Oregon* v. *Hass*, No. 73–1452, decided March 19, 1975; *Harris* v. *New York*, *supra*. See also *Walder* v. *United States*, 347 U.S. 62.

3. During his testimony, petitioner Matteo generally denied trafficking in narcotics (Tr. I, 576–578, 593) and specifically denied meeting anyone at the Club International for the purpose of arranging a purchase of narcotics (Tr. I, 613). In rebuttal, the government offered testimony that showed that Matteo had traded in drugs (Tr. I, 630), that a meeting between a narcotics dealer and Matteo had been arranged at the latter's request (Tr. I, 630–631), that Matteo was introduced to the narcotics dealer at the Club International (Tr. I, 631), and that Matteo effected a large purchase of narcotics several days later (Tr. I, 631–632).

Petitioner Matteo claims (Pet. 28–31) that this rebuttal testimony was improperly received. But as petitioner concedes (Pet. 29), the admissibility of rebuttal evidence is within the broad discretion of the trial court, and its determination will not be reversed unless that discretion has been abused. See, *e.g.*,

United States v. *Perez*, 491 F. 2d 167, 173 (C.A. 9), October 15, 1974 (No. 73–6784); *United States* v. *Fench*, 470 F. 2d 1234 (C.A.D.C.), certiorari denied *sub nom. Blackwell* v. *United States*, 410 U.S. 909. That discretion was not abused here. Matteo had flatly denied ever dealing in narcotics; in the circumstances of this case it was well within the court's discretion to allow the government to impeach Matteo's credibility by introducing evidence that contradicted his testimony. *Harris* v. *New York, supra; Walder* v. *United States, supra.* See, also, *United States* v. *Gonzalez*, 491 F. 2d 1202, 1204 (C.A. 5); *United States* v. *Gant*, 487 F. 2d 30, 33 (C.A. 10), certiorari denied, 416 US 941; *United States* v. *Fench, supra.*

4. Petitioner Matteo further argues (Pet. 31–34) that he was denied the effective assistance of counsel because his trial attorney failed to object to the admission of certain evidence that Matteo characterizes as irrelevant and prejudicial. Specifically, he points to the use for impeachment purposes of McCormack's grand jury testimony and his own admissions to Agent Schnepper and to the introduction of evidence about his near-fatal shooting. But as we have shown above, the impeaching evidence was properly admitted. And the evidence of the circumstances surrounding Matteo's shooting was relevant and admissible. The discovery of narcotics paraphernalia and a large amount of cash in co-conspirator Indiviglio's home, at the time of Matteo's shooting in that home, tended to corroborate Aguiar's testimony that, on the day before the shooting, he had given Matteo $60,000 for the

purchase of a large quantity of heroin. Any objection to the introduction of that evidence presumably would have been unavailing.

The tactical and strategic decisions made by an attorney during the course of a trial are not ordinarily subject to scrutiny on review. See, *e.g., United States ex rel. Walker* v. *Henderson,* 492 F. 2d 1311 (C.A. 2), certiorari denied, 417 U.S. 972; *United States* v. *Grant,* 489 F. 2d 27 (C.A. 8). However, under any applicable standard of appellate review, the record supports the conclusion that petitioner Matteo was, in fact, afforded adequate assistance of counsel. Compare *United States* v. *Robinson,* 502 F. 2d 894, 896 (C.A. 7), *United States ex rel. Walker,* v. *Henderson, supra,* and *United States* v. *Miramon,* 470 F. 2d 1362 (C.A. 9), certiorari denied, 411 U.S. 934 (ineffective representation consists of conduct that shocks the conscience of the court and makes the proceedings a farce and mockery of justice) with *United States* v. *DeCoster,* 487 F. 2d 1197, 1202 (C.A.D.C.) (defendant entitled to "the reasonably competent assistance of an attorney acting as his diligent conscientious advocate").

Matteo's trial attorney conducted an extensive cross-examination of the government's witnesses, presented a plausible theory of defense in his opening statement, explored that defense through Matteo's own testimony, and summarized the evidence and his theory during final arguments. The record fails to disclose (and petitioner Matteo does not allege) any potentially exonerating defenses that were not considered by defense counsel or any exculpatory evidence that was not

introduced. Throughout the trial, defense counsel rendered the reasonably effective assistance demanded of an attorney of ordinary skill and training in criminal law. See *McMann* v. *Richardson*, 397 U.S. 759, 770–771; *Beasley* v. *United States*, 491 F. 2d 687, 696 (C.A. 6).

5. Petitioner Indiviglio contends (Pet. 4–5, 7–8) that there was insufficient non-hearsay evidence to establish his participation in the conspiracy.[8] We disagree. The direct evidence showed that petitioner Matteo lived in an apartment building owned by Indiviglio and that he picked up samples of heroin from a laboratory located in that building; that Matteo and Somas had paid for Indiviglio's trip to France out of their narcotics earnings; that following Indiviglio's trip to France he reported to Somas that someone in Newburgh, New York, had taken away his connection, and Somas was sent to steal a letter relating to this lost connection; and that a large quantity of laboratory equipment suitable for processing heroin was found in Indiviglio's home. Moreover, Fay Somas testified to a conversation with Indiviglio during which the latter stated that he had made "millions" by importing heroin secreted in foreign cars.[9] Accord-

[8] Petitioner Breen also incorporates this contention in his petition, but there was ample direct evidence of Breen's involvement in narcotics transactions to warrant the admission against him of the declarations of co-conspirators. See *Glasser* v. *United States*, 315 U.S. 60, 80; *United States* v. *Santana*, 503 F. 2d 710 (C.A. 2), certiorari denied, December 9, 1974 (No. 74–5311).

[9] That testimony was of course admissible against the declarant, Indiviglio, as an admission without regard to the admissibility of the declarations of his co-conspirators. Cf. *Lutwak* v. *United States*, 344 U.S. 604, 618.

ingly, McCormack's declaration to Aguiar that Indiviglio supplied heroin to him was properly considered by the jury. *United States* v. *Santana, supra; United States* v. *Geaney,* 417 F. 2d 1116, 1121 (C.A. 2), certiorari denied *sub nom. Lynch* v. *United States,* 397 U.S. 1028.

6. Petitioners Indiviglio and Breen contend (No. 74–1143, Pet. 5–7; No. 74–6161, Pet. 15) that the trial court erred in allowing a portion of the government's summation to be read to the jury. It is well recognized, however, that the trial court has wide discretion in evaluating the consequences of reading portions of the transcript to the jury.[10] See, *e.g., United States* v. *Thornton,* 498 F. 2d 749, 753 (C.A.D.C.). Although petitioners allege that prejudice resulted, neither they nor the record substantiates that claim.

During its deliberations, the jury requested that the government's summation be read to them. Prior to the reading of the requested transcript the court admonished (Tr. II, 865):

> Now, again understand that summation is not testimony. It's just the argument of counsel and don't lose sight of the other summations by the other lawyers * * *.

Thereafter, the court reporter read back a portion of the government's summation. After the jury was satisfied that they had heard enough of the summation, the court again instructed (Tr. II, 868):

[10] The court's discretion is not limited to the reading of evidentiary portions of the transcript. See, *e.g., United States* v. *Polizzi,* 500 F. 2d 856, 876 (C.A. 9), certiorari denied, January 20, 1975 (No. 74–322).

> The portion of the summation was a discussion by Mr. Weintraub of the evidence. Of course, that isn't evidence, it's only what he says, what he finds from the evidence.

It is apparent that the jury's verdicts resulted from a careful evaluation of the evidence. At the same time that the jury requested the reading of the summation, it also asked to see Exhibit 47 (a shipping notice) (Tr. II, 359, 857). Thereafter, the jury asked to examine Exhibit 52, consisting of several documents found in petitioner Indiviglio's home (Tr. II, 446, 867) and all of the letters from "Bob" that were found in Indiviglio's home (Tr. II, 867). The jury then requested Exhibit 46, a photograph of the money found near Matteo's body following his shooting (Tr. II, 359, 869). Finally, it requested and heard Aguiar's testimony on direct examination, on cross-examination by Indiviglio's counsel, on redirect examination, and on recross-examination by Indiviglio's counsel (Tr. II, 870–872). Certainly in these circumstances the reading of a portion of the government's summation, which the jury used, at most, as a guide to the evidence, did not cause substantial prejudice or constitute reversible error. Cf. *United States* v. *Thornton, supra.*

7. Petitioner Breen contends (Pet. 9–14) that certain admissions to his friend, James Schmidt, were improperly admitted at trial because he had been intoxicated at the time he made them.[11] The criterion for the

[11] Schmidt was a police officer, but petitioner Breen concedes (Pet. 10) that his statements were not the result of a custodial interrogation.

admissibility of confessons or admissions made while in a state of self-induced intoxication is simply that of trustworthiness. See III Wigmore, *Evidence,* § 841 (2), pp. 489–493 (Chadbourn rev.). There was ample evidence here that Breen was not so intoxicated that his admissions were inherently untrustworthy.

Breen had placed a telephone call to a Long Island bar where Schmidt's in-laws worked. Breen explained that he was in a downtown Manhattan bar and needed a ride to Long Island because the train was not running at that hour of the night (Tr. II, 424, 429–430, 460, 542). Breen gave Schmidt detailed directions on how to reach the Manhattan bar; thereafter, Schmidt drove to meet Breen (Tr. II, 430–431). Upon reaching the bar, Schmidt played a game of pool with Breen (Tr. II, 427) and also engaged in a discussion over drinks. It was during this time that Breen made the inculpatory statements. Subsequently, Schmidt drove Breen back to Long Island. Schmidt characterized Breen's conversations that night as both coherent and responsive (Tr. II, 462–463). Schmidt's characterization was corroborated in part by Breen, who was able to reconstruct the events of the night in question (Tr. II, 529–532, 540–543), admitted that he remembered the happenings of that night "fairly well" (Tr. II, 542), and conceded that he could hold his liquor "fairly well" (Tr. II, 541). Accordingly, there, was ample basis for the trial court's conclusion that Breen's statements were sufficiently trustworthy to be admissible. Cf. *Lego* v. *Twomey,* 404 U.S. 477.

8. Finally, petitioner Breen urges (Pet. 14–15) that this Court further review certain sealed grand jury transcripts and investigative reports to determine whether all material relating to the testimony of the government's witnesses was produced. However, a criminal defendant is not entitled to the production of statements of witnesses "which do not relate to the subject matter of their testimony" (*Scales* v. *United States,* 367 U.S. 203, 258) or to investigative reports that are "the product of the investigator's selections, interpretations, and interpolations" (*Palermo* v. *United States,* 360 U.S. 343, 350) and were not the subject of testimony at trial.

The trial court conducted an *in camera* inspection of the material here in question, and it was then sealed and forwarded to the court of appeals for an "appropriately limited review." *Palermo* v. *United States, supra,* 360 U.S. at 353. Petitioner Breen neither demonstrates a "particularized need" for the material nor does he show that the determinations of the courts below were clearly erroneous. Further review by this Court is unwarranted. See *United States* v. *Fanning,* 477 F. 2d 45, 49 (C.A. 5), certiorari denied, 414 U.S. 1006; *United States* v. *Graves,* 428 F. 2d 196, 200 (C.A. 5), certiorari denied, 400 U.S. 960.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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